Nos. 80-1190 and 80-1193

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PULLMAN-STANDARD,
a Division of Pullman, Incorporated
Petitioner,
v.
LOUIS SWINT and WILLIE JOHNSON,
Respondents.

UNITED STEELWORKERS OF AMERICA,
AFL-CIO and LOCAL 1466,
UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Petitioners,
v.
LOUIS SWINT and WILLIE JOHNSON,
Respondents.

On Writs of Certiorari to the United States Court of Appeals
For The Fifth Circuit

BRIEF FOR PETITIONERS UNITED STEELWORKERS OF AMERICA, AFL-CIO AND LOCAL 1466, UNITED STEELWORKERS OF AMERICA, AFL-CIO

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QUESTIONS PRESENTED

This Court limited the writs of certiorari to the first question presented in each of the petitions. Accordingly, the questions presented are as follows:

1. Whether a federal court of appeals is bound by the "clearly erroneous" rule of F. R. Civ. Pro. 52(a) in reviewing a district court's findings of fact, arrived at after a lengthy trial, as to the motivation of the parties who negotiated a seniority system.

2. Did the Court below apply wrong legal criteria in determining the bona fides of the seniority system?

LIST OF PARTIES

In addition to the parties named in the caption, the following were parties to this proceeding in the court of appeals: International Association of Machinists and Aerospace Workers (IAM), and its Local No. 872. Respondents Louis Swint and Willie Johnson have been certified in this action as representatives of a class consisting of all black persons employed by Pullman at its Bessemer, Alabama plant as production and maintenance employees in the bargaining unit represented by petitioner United Steelworkers of America at any time since one year prior to the filing of the first EEOC charge. (It was determined below that the first such charge was filed on March 27, 1967).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
LIST OF PARTIES	ii
OPINIONS BELOW	2
JURISDICTION	2
STATUTES AND RULES INVOLVED	2
STATEMENT OF THE CASE	3
A. Procedural Overview	3
B. The Findings Of The District Court And The Relevant Record Evidence	4
1. Background Facts	5
2. The District Court's Findings With Respect To The Motivation Of The Seniority System	9
a. Findings As To Evidence Affirmatively Showing That The Seniority System Was Not Discriminatorily Motivated	9
b. Findings As To Respondents' Contentions That Discriminatory Motivation Should Be Inferred From Evidence Concerning Matters Other Than the Seniority System	19
C. The Court of Appeals' Opinion	26
SUMMARY OF ARGUMENT	27
ARGUMENT	29
CONCLUSION	49
APPENDIX	1a

TABLE OF AUTHORITIES

Cases:	Page
Bostic v. Boorstin, 617 F.2d 871 (CA DC, 1980)	32
Burdine v. Texas Dept. of Community Affairs, 608 F.2d 563 (CA 5, 1979), *reversed on other grounds*, —— U.S. —— 49 L.W. 4214 (1980)	31
California Brewers v. Bryant, 444 U.S. 598	30
Causey v. Ford Motor Co., 516 F.2d 416 (CA 5, 1975)	31
Commissioner v. Duberstein, 363 U.S. 278	36
Crawford v. Western Electric Co., 614 F.2d 1300 (CA 5, 1980)	31
Danner v. United States Civil Serv. Comm'n, 635 F.2d 427 (CA 5, 1981)	31
Dayton Board of Education v. Brinkman, 443 U.S. 526	28, 37
Duckett v. Silberman, 568 F.2d 1020 (CA 2, 1978)	32
Duke Power Co. v. Carolina Env. Study Group, 341 U.S. 59	38
East v. Romine, Inc., 518 F.2d 332 (CA 5, 1975)	31
EEOC v. Chesapeake & O. Ry., 577 F.2d 229 (CA 4, 1978)	32
Franks v. Bowman Transportation Co., 424 U.S. 747	30
Garval v. Arthur G. McKee, —— F.2d ——, 25 FEP Cases 1565 (CA 9, 1981)	32
Guzman v. Pichirilo, 369 U.S. 698	38
James v. Stockham Valves and Fittings Co., 559 F.2d 310 (CA 5, 1977)	11
Kendrick v. Comm. of Zoological Subdistrict, 565 F.2d 524 (CA 8, 1977)	32
Kunda v. Muhlenburg College, 621 F.2d 532 (CA 3, 1980)	32
McAllister v. United States, 348 U.S. 19	38
Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374 (CA 5, 1978), *cert. denied*, 441 U.S. 968	31
Peurifoy v. Commissioner, 358 U.S. 59	38
Phillips v. Joint Legislative Com., 637 F.2d 1014 (CA 5, 1981)	31

TABLE OF AUTHORITIES—Continued

	Page
Silberhorn v. General Iron Works Co., 584 F.2d 970 (CA 10, 1978)	32
Smith v. South Central Bell Telephone Co., 518 F.2d 229 (CA 6, 1975)	32
Stewart v. Geenral Motors Corp., 542 F.2d 445 (CA 7, 1976), *cert. denied*, 433 U.S. 919	31
Sweeney v. Bd. of Trustees of Keene State College, 604 F.2d 106 (CA 1, 1979), *cert. denied*, 444 U.S. 1045	32
Teamsters v. United States, 431 U.S. 324	*passim*
Terrell v. United States Pipe & Foundry Co., 644 F.2d 1112 (CA 5, 1981)	11, 21
Texas Department of Community Affairs v. Burdine, —— U.S. ——, 49 L.W. 4214 (March 4, 1981)	30
Thompson v. Leland Police Dept., 633 F.2d 1111 (CA 5, 1980)	31
Trans World Airlines, Inc. v. Hardison, 432 U.S. 63	29, 30
United Airlines, Inc. v. Evans, 431 U.S. 553	30
United States v. duPont & Co., 351 U.S. 377	38
United States v. Gypsum Co., 333 U.S. 364	35
United States v. Oregon Med. Soc., 343 U.S. 326	37
United States v. Parke Davis & Co., 362 U.S. 29	35-36
United States v. Real Estate Boards, 339 U.S. 485	34
United States v. United States Steel Corp., 371 F.Supp. 1045 (N.D. Ala. 1973), reversed in part on other grounds, 520 F.2d 1043 (CA 5, 1975), cert. denied, 429 U.S. 817	11
Whitfield v. United Steelworkers, 263 F.2d 546 (CA 5, 1959)	11
Williams v. Tallahassee Motors, Inc., 607 F.2d 689 (CA 5, 1979)	31
Wright v. Rockefeller, 376 U.S. 52	38
Zenith Corp. v. Hazeltine, 395 U.S. 100	38

TABLE OF AUTHORITIES—Continued

Page

Statutes:

Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e:
§ 703(h), 42 U.S.C. § 2000e-2(h) ..... *passim*

Rules:

Federal Rules of Civil Procedure:
Rule 52(a) ..... *passim*

Miscellaneous:

Executive Order 11246 8
5A Moore's Federal Practice, § 52.01 33
Gunnar Myrdal, *An American Dilemma* (1944) 11
9 Wright and Miller, Federal Practice and Procedure, § 2587 33-34

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BRIEF FOR PETITIONERS UNITED STEELWORKERS OF AMERICA, AFL-CIO AND LOCAL 1466, UNITED STEELWORKERS OF AMERICA, AFL-CIO

This brief is the joint product of petitioners United Steelworkers of America (USW) and its Local 1466, and of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the federation

of national and international unions with which USW is affiliated. The decision to file a single brief reflects the identity of their views on the issues presented, and their desire to minimize the burdens on the Court by stating their common position once and not twice.

OPINIONS BELOW

The original opinion of the district court is reported at 11 FEP Cases 943 (N.D. Ala. 1974), and is reprinted in the separate appendix to the petition in No. 80-1193 as App. F. (117a-155a). The first opinion of the court of appeals is reported at 539 F.2d 77 (CA 5, 1976), and is reprinted as App. E (67a-116a). The opinions of the district court on remand are reported at 15 FEP Cases 155 (N.D. Ala. 1977), 15 FEP Cases 1638 (N.D. Ala. 1977), and 17 FEP Cases 730 (N.D. Ala. 1978), and are reprinted respectively as App. D (48a-66a), App. C (45a-47a) and App. B (23a-44a). The second opinion of the court of appeals—the decision under review—is reported at 624 F.2d 525 (CA 5, 1980), and is reprinted as App. A (1a-22a).

JURISDICTION

The court below entered judgment on August 18, 1980, App. G (156a). On November 6, 1980, Mr. Justice Powell extended the time for filing a petition for certiorari to and including January 15, 1981, App. H (158a), and the petition was filed on that date. This Court has jurisdiction to review the judgment below under 28 U.S.C. § 1254(1).

STATUTES AND RULE INVOLVED

The pertinent parts of Sections 703(a) (c) and (h) and 706(g), Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2(a), (c) and (h), and -5(g); of the Civil Rights Act of 1866, 42 U.S.C. § 1981; and of Rule

52(a), F.R.Civ.Pro., are reprinted in the appendix bound at the back of the petition in No. 80-1193.

STATEMENT OF THE CASE

A. Procedural Overview

Respondents, on behalf of themselves and other black employees at Pullman-Standard's Bessemer, Alabama plant, brought suit against Pullman-Standard ("the Company") and United Steelworkers of America, AFL-CIO-CLC and its Local 1466 (collectively "USW"), alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and the Civil Rights Act of 1866, 42 U.S.C. § 1981. Only one of respondents' claims is at issue in this Court—their claim that the seniority system maintained by the Company and USW violated these laws.

While litigation of that claim had had a lengthy and somewhat complex history, after this Court's decision in *Teamsters v. United States*, 431 U.S. 324, the challenge to the seniority system boiled down to a single question: was the system adopted or maintained for a discriminatory purpose. The district court, Judge Sam C. Pointer, found "that the system is 'bona fide' and that the differences in terms, conditions or privileges of employment resulting thereunder are 'not the result of an intention to discriminate' because of race or color," and accordingly, pursuant to § 703(h) of Title VII, entered judgment for USW and the Company on this issue (App. 44a).[1] The Fifth Circuit reversed, "because we find" the system to have "resulted from an intent to discriminate because of race" (App. 16a).

The legal issue presented in USW's petition on which this Court has granted certiorari involves the proper al-

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[1] The petitioners filed separate appendices with their petitions, which are paginated differently. Throughout this brief, references to the various opinions in this case are to the appendix accompanying the Union's petition (No. 80-1193) and are cited as "App. ——." The Joint Appendix is cited as "JA ——."

location of fact-finding functions between district court and court of appeals. To facilitate analysis of that issue, we have chosen to structure our statement of facts in a somewhat unconventional manner. We do not proffer our own version of the facts. Instead, we begin by reciting the facts as found by the district court, detailing in footnotes the record evidence relevant to each of those findings. We then set out the court of appeals' statement of the quite different facts "found" by that court. We comment on the relation of the court of appeals' "findings" to the record evidence in the argument. For the Court's convenience we have also attached to this brief an appendix setting out the four "facts" that the court of appeals declared "significant in our decision" (App. 16a), and a compilation of the district court's findings and of the record evidence that relate to those "facts."

B. The Findings of The District Court and the Relevant Record Evidence

The district court heard, in three trials, 20 days of testimony (JA 5-7, 10, 12)[2] and reviewed a mass of documentary evidence relating to the negotiation and maintenance of the seniority system at issue including "the detailed record of negotiation sessions and contracts which span a period of some thirty-five years" (App. 43a).[3] On the basis of this evidence, the court entered extensive findings of fact detailing the origins of the seniority system and examining the underlying reasons for every aspect of the system challenged by respondents.

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[2] Excerpts from this testimony are reprinted at JA 31-64, 91-102.

[3] The Company prepared and maintained, for its internal use, minutes of all collective bargaining sessions beginning with the first round of negotiations in 1941. Excerpts from a number of these minutes are reprinted in the Joint Appendix (JA 207-241, 254, 256-258, 261-264, 268, 270-271), together with contract proposals exchanged during the first round of negotiations in 1941 (JA 260, 265-267, 269, 272-278). All of the collective bargaining agreements were introduced into evidence, and excerpts from those in which the seniority system was changed in some respect from the preceding agreement are reprinted in the Joint Appendix (J.A. 167-205).

1. *Background Facts*

Pullman-Standard is the world's largest manufacturer of railway freight cars and parts (App. 118a). At its Bessemer, Alabama plant—the subject of this lawsuit—the Company fabricated railroad cars (*ibid*).[4] The operations at the plant were diverse (App. 31a), with more than one hundred different production and maintenance jobs (App. 119a).[5] Because operations at the plant were performed in response to specific orders for railroad cars, and because the demand for such cars was sporadic, there were frequent and dramatic fluctuations in the level of employment, which ranged from 2,800 employees during peak employment periods to less than 200 at ebb periods (App. 118a and n. 4).[6] Both before and after unionization of the plant in 1941, the plant was divided by the Company into departments for operational purposes (App. 34a-37a).[7]

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[4] We use the past tense, although the district court did not, because in January, 1981, the Company announced the permanent closing of its Bessemer plant. That closing does not moot this case, in which respondents seek backpay for past events.

[5] The record contains the testimony of the Company's plant manager before the National Labor Relations Board in 1941, during which he described in elaborate detail the manifold operations at the plant and many of the distinct jobs to which employees were assigned (JA 105, 110-143), and the testimony of the assistant plant manager at the 1974 trial herein describing the diversity of operations as of that date (JA 36-40).

[6] The record contains a graph depicting the employment levels by months from 1958 through mid-1974 (JA 90).

[7] The Company's plant manager, testifying before the NLRB in 1941, stated: "[W]e operate by departments . . . . They are all different" (JA 114-115). There were 21 departments immediately prior to the NLRB elections, identified on the voting list used for that election (JA 103). The distinct functions of the various departments were described in the plant manager's testimony to the NLRB (JA 110-143). Changes in departments in succeeding years are reflected in a chart which is reproduced at JA 336.

The USW was elected in 1941 as the bargaining representative of employees in a bargaining unit containing the bulk of the production and maintenance jobs at the Bessemer plant (App. 35a-36a, JA 162).[8]

Although USW had no role in job assignments, and did nothing to "foster" discrimination by the Company (App. 41a),[9] at all times prior to March, 1965, the Company pursued a policy of assigning employees to jobs on the basis of race (App. 54a). Until that date, most jobs were treated by the Company as either "white" jobs or "black" jobs, and were occupied only by persons of that race (*ibid*). In some departments, where all of the jobs were "consigned" to employees of the same race, the result was that as of March, 1965, all of the employees in the department were of the same race (*ibid*). There were eight such departments; five, with a total employee complement of 80, were all-white, and three, with a total complement of 40, were all-black. Collectively they contained a very small percentage of the employees in USW's bargaining unit (less than 7% of the white employees and less than 4% of the black employees). (App. 128a).[10]

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[8] USW began under the name "Steel Workers Organizing Committee", or "SWOC," and changed its name to "United Steelworkers of America" ("USW") in 1942 (App. 35a, n. 15). As did the district court, for simplicity we refer to the organization both before and after 1942 as "USW" (*ibid*).

[9] Indeed, from 1941 forward USW attempted to end the practice, and ultimately succeeded prior to effective date of Title VII. See *infra*, at 14, n. 27; 15.

[10] The court prepared a chart, from the June, 1965 seniority roster, which shows, *inter alia*, the racial composition of the 25 departments in USW's bargaining unit as of that date. The chart is reproduced at App. 128a. As reflected there, the five all-white departments (Template (9 employees), Powerhouse (4), Inspection (28), Air Brake (27), and Plant Protection (12)) collectively contained 80 employees—less than 7% of the 1173 white employees then in the USW bargaining unit. The three all-black departments

The vast majority of employees (more than 96% of the blacks and 93% of the whites, see n. 10, *supra*) were in racially-mixed departments. That result came about not because pre-1965 job assignments had been color-blind, but rather because the departments contained both "black" and "white" jobs to which employees had been assigned by the Company on the basis of race:

> [E]ven in mixed departments whose racial composition approximated that of the plant as a whole, the assignments were dependent upon whether particular job openings were for a white or black position, rather than a "mixed" one. . . . [T]here was a plant-wide policy of making assignments to departments based on race—not as a policy to segregate departments, but as a means to carry out the plant-wide practice of job segregation. [App. 54a-55a].

The court found—indeed it was not disputed—that the seniority system (which made departmental age the measure of job competition for layoff, recall, and promotion)[11] did not perpetuate the effects of prior job segregation *within* departments:

> There is no claim that the effects of prior discrimination in segregation of jobs within a department are perpetuated by the USW seniority system, for the system allows use of departmental age for promotions without the interposition of lines of progression.
>
> • • • •

(Truck (21 employees), Die & Tool (9), and Janitors (10)) collectively contained 40 employees, less than 4% of the 1151 black employees then in the USW bargaining unit.

[11] From 1941 to 1956, seniority was applicable only to layoffs and recalls (i.e. "in the event of increases and decreases in force"). In 1956, seniority was made applicable to promotions as well. See *infra*, at 14, n.27.

> The major impediment to employment opportunities for blacks—the custom of treating certain jobs as reserved for members of a particular race—was removed prior to the effective date of Title VII by the very instrument here under attack, i.e. the seniority system. That system did not then provide—nor has there been any subsequent effort to erect—barriers to the reaching of one's "rightful place" as is typically provided by lines of progression. [App. 27a, n. 4; 43a].[12]

But the court found that the seniority system perpetuated pre-Act discrimination in job assignments *as between* departments, because it created disincentives to transfer from one department to another (App. 28a), *viz*:

> Employees transferring from one department to another were treated as "new" employees in the department to which transferred (i.e. no carryover of seniority) and, with limited exception for those transferring at the request of the company or electing transfer in lieu of layoff, also lost their seniority in the "old" department. [App. 26a].[13]

Accordingly, the court concluded that, in light of *Teamsters*, the lawfulness of the seniority system depended upon whether or not it was negotiated and maintained with a discriminatory purpose.[14]

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[12] The method by which the seniority system proved to be the instrument for ending the Company's discrimination in job assignments is described *infra*, pp. 14-15.

[13] JA 194-196. In 1972 the parties, at the behest of the Office of Federal Contract Compliance, acting pursuant to Executive Order 11246, agreed to afford special rights to affected blacks to transfer their accumulated seniority between departments (App. 28a-29a, 123a).

[14] The court ruled (erroneously, we believe, see *infra*, at 30, n.40) that the burden was on the defendants to prove that their seniority system had *not* been negotiated or maintained with discriminatory purpose. "The defendants, as in the nature of an affirmative de-

2. *The District Court's Findings With Respect To The Motivation Of The Seniority System*

The district court found that "the [seniority] system is 'bona fide' and . . . the differences in terms, conditions or privileges of employment thereunder are 'not the result of an intention to discriminate' because of race or color" (App. 44a). The underlying findings upon which that determination was based fell into two categories: (1) findings as to evidence affirmatively showing that the seniority system was *not* discriminatorily motivated; and (2) there being no direct evidence that the system *was* discriminatorily motivated, findings as to the respondents' contentions that such motivation should be inferred from evidence concerning matters other than the negotiation and maintenance of the seniority system.

a. *Findings As To Evidence Affirmatively Showing That The Seniority System Was Not Discriminatorily Motivated*

The court found that in every respect the seniority system was, and always had been, race neutral on its face and "applied equally to all races and ethnic groups" (App. 28a). "To the extent the system 'locks' employees into a department and discourages transfers, it does so equally for both white and black . . ." (App. 28a-29a).

The court found that the system was "essentially a product of USW aims and policies," not those of the Company (App. 40a). The use of departmental age as the measure of seniority was adopted, at the request of USW, in the first round of negotiations—which began in 1941 and concluded in an agreement in early 1942 (App.

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fense, have the burden to show that the seniority system in question was bona fide and the differences caused thereunder were not the result of any intent to discriminate on the basis of race or color" (App. 25a). The court's ultimate conclusion was that "defendants have met the burden" (App. 44a).

40a).[15] In the 1947 negotiations, at the union's request,[16] the measure of seniority was changed from departmental to "occupation-within-a-department" seniority (App. 40a).[17] In 1954, departmental age was reinstated as the measure of seniority (*ibid.*).[18] Company efforts in subsequent years to broaden the application of seniority by merging certain departments were successfully resisted by the union (App. 40a-41a).[19]

Because USW had thus played the pivotal role in determining the type of seniority system operative at the plant, the court made extensive findings as to USW's attitudes on questions of race and as to the role that black employees had played in determining USW's bargaining position respecting the seniority system.

The court found that at all times USW was committed to "colorblind objectives" and "—unlike most structures and institutions of the era—was not an arm of a segregated society" (App. 41a).[20] The court further found:

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[15] The seniority provision of USW's first contract is reprinted at JA 180-181. It provides: "No employee shall hold seniority in more than one department . . ." (JA 181). As reflected by a contemporaneous internal Company memorandum, dated Dec. 9, 1941, this language was first proposed by USW (JA 265). The original agreement did not designate departments. With a few exceptions, discussed *infra*, the departments established by the Company for operational purposes prior to unionization were the departments within which seniority was exercised (JA 336).

[16] JA 256.

[17] JA 189 ("Occupational seniority within a department will prevail for all employees other than probationary employees . . .").

[18] JA 194 ("Departmental seniority will prevail for all employees other than probationary employees").

[19] JA 54-61.

[20] These findings are supported not only by the evidence respecting this plant, recounted *infra*, but also by contemporaneous

> One of the few mutual and common ventures of blacks and whites at Pullman's Bessemer plant in 1941 . . . was the unionization effort by the . . . USW. The success of its drive for representation and recognition must be attributed in large part to the black workers, who constituted more than half of the election unit. In 1954, as was true in 1941 and in the intervening years, blacks were involved actively in the leadership of the local union and had at least an equal voice in the formulation of the policies and positions of the union—the local not being dominated by whites. While possessing some of the trappings taken from an otherwise segregated society, the USW local was one of the few institutions in the area which did not function in fact to foster and maintain segregation. It cannot be said

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and later evaluations of USW's performance in general.

Gunnar Myrdal, in his historic work, *An American Dilemma* (1944), said of the Steelworkers:

> This union has been the first which has consistently given real protection to the Negro. [*Id.* at 1117.]

Judge Hatchett, the author of the Court of Appeals opinion below, subsequently said of USW (in a case involving a seniority system negotiated contemporaneously at another plant in Bessemer, Alabama):

> The district court found that the evidence in this case supported the general observation that the Steelworkers constituted "one of the few institutions in the area which did not function in fact to foster and maintain segregation." The United Steelworkers of America has a well-known history of striving to achieve racial equality and integration in the labor movement.

Terrell v. United States Pipe & Foundry Co., 644 F.2d 1112, 1121 (5th Cir. 1981). See also, *Whitfield v. United Steelworkers*, 263 F.2d 546, 547-551 (5th Cir. 1959); *James v. Stockham Valves and Fittings Co.*, 559 F.2d 310, 315, 352-354 (5th Cir. 1977); *United States v. United States Steel Corp.*, 371 F.Supp. 1045, 1055, 1060 n. 39, 1062 (N.D. Ala. 1973), reversed in part on other grounds, 520 F.2d 1043 (5th Cir. 1975), cert. denied, 429 U.S. 817 (1976).

> that the union served the cause of segregation; rather, it served a joint interest of white and black workers which had a higher priority than racial considerations. [App. 39a-40a, footnote omitted)].[21]

The Court noted too:

> Blacks, constituting approximately half the work force, have played a major force in the formation

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[21] Blacks were at the forefront of the USW organizing drive at the Bessemer plant (JA 43-44). At all times the USW Local at this plant had approximately equal numbers of black and white officers and negotiators, and a majority of black shop stewards (JA 44, 52-53, 66-89, 94-96, 208, 212, 218, 222, 228, 230-236, 240, 254, 256, 257, 263, 268, 270). Proposals on seniority, as on all other matters, were debated fully and voted upon at union meetings, with blacks and whites participating equally (JA 54-61, 94-95); indeed, blacks often constituted a majority of those voting (JA 54-61). Voting was by standing vote, and on no occasion did the vote on contract proposals divide along racial lines (JA 96).

Manifesting USW's early commitment to attacking racial discrimination at this plant was its drive, immediately upon certification, to eliminate the disparity in earnings between blacks and whites in the plant. As the Company lamented in a brief to the War Labor Board in 1943, responding to USW's charges of racial discrimination and quest for an elevation of black employees' wages:

> No one ever heard of alleged 'Negro-white' discrimination at this plant until CIO's representative indulged in that suggestion, first in Washington before the War Labor Board in 1941 . . . and again at the time of the negotiation of the contract in 1942, when the alleged mistreatment of Negroes was one of the arguments for a wage increase before the War Labor Board panel. [JA 315-316].

The elimination of these wage disparities remained a union negotiating objective throughout the 1940's (JA 216-220).

The "trappings" to which the district court referred in the quote in text were separate black and white picnics until the early 1950's (JA 91-92); separate washrooms at the local union hall into the 1960's (JA 96-97); and, whether by mandate or personal choice (the record is not clear), blacks and whites sitting on separate sides of the hall during union meetings until the early 1970's (JA 92-94) (just as they did during the trial of this case in a federal courtroom in 1978 (JA 92)).

> and direction of the USW local, occupying positions as officers, committeemen and negotiators [J.A. 34a, n. 14].[22]

Black USW negotiators often played the principal role in determining the direction of the seniority system: for instance, the narrowing of the seniority system in 1947 from departmental seniority to "occupation-within-a-department" seniority was "at the request of a black member of [the] USW negotiating committee" (App. 40a);[23] and the retention of plant protection and janitors as separate departments—a step seen by respondents as "frustrating opportunities for black employees" and hence indicative of racial motivation (App. 37a) —was at the insistence of "a black member of [the] negotiating committee who was a member of the Janitors department," rejecting the suggestion of a white member of the USW negotiating committee that the departments be merged (App. 37a, n. 18).[24] Blacks likewise played a pivotal role at union meetings in speaking and voting against Company proposals to broaden the seniority system by merging departments (App. 34a).[25]

The court found from the foregoing that the seniority system in effect at the Bessemer plant "has been negotiated and maintained by blacks, no less than whites" (App. 43a).

In addition to its examination of USW's motivation, the court "carefully considered the detailed record of negotiation sessions . . . which span a period of some

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[22] See n. 21, *supra*.

[23] JA 256. The USW negotiating committee which had demanded and won departmental seniority in the original negotiations in 1941-1942 (n. 15, *supra*), consisted of three white and two black union representatives (JA 263, 268, 270).

[24] JA 238.

[25] JA 54-61.

thirty five years" and found that they corroborated its conclusion that "the seniority system between the Company and the USW has been negotiated and maintained free from any discriminatory purpose" (App. 43a).[26]

The court found the events surrounding the extension of seniority to promotions in 1956 to be further evidence that race was not a motivating factor in the seniority system.[27] In making that extension, the parties "did not

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[26] The minutes of the negotiating meetings were prepared by the Company contemporaneously for its internal use. Not once in any of the discussions of the seniority system during the 35 year period do the minutes reflect any reference to race or racial considerations with the exception of the discussions concerning the granting to blacks of special transfer rights as proposed by the OFCC. This is particularly informative, for in other respects the minutes were replete during the 1940's and 1950's with racial references: the race of USW's black negotiators invariably was noted (see, e.g., JA 208, 212, 222, 254, 256, 263, 268, 270); the race of the spokesmen for particular USW proposals was noted (see, e.g., JA 208, 213, 220-221, 254); the racial identity of pickets during strikes was noted (e.g., JA 209-211, 219, 224-227); and, there were repeated indications that race had been discussed as relevant to particular subjects of negotiations (e.g. USW's request during the 1940's for equalization of black and white wages (JA 216-220)).

[27] While USW did not ultimately secure seniority for promotions until 1956 (App. 26a), the Union had been seeking such a provision from the start. USW's bargaining proposals throughout the 1941-42 negotiations would have made seniority applicable "in all cases of promotion" as well as in "increasing and decreasing the forces" (JA 263-264, 266-267, 272-273). The vast majority of black employees were in integrated departments in 1941 (JA 103), and USW's proposal would have entitled them to use their seniority to promote into the "white" jobs in those departments. The Company's counter-proposals made seniority applicable only "in all cases of increase or decrease of forces" (JA 269, 272), the plant manager insisting upon its proposal as "more applicable to this plant" (JA 271). Similarly, in the 1947 negotiations, the Union's request for seniority for promotions was rejected by the Company on the ground that "such would not work at this plant" (JA 256).

then provide—nor has there been any subsequent effort to erect—barriers to the reaching of one's 'rightful place' as is typically provided by lines of progression" (App. 43a).[28] Indeed, because no such barriers were erected, "this very seniority system . . . provided the means for stopping [the Company's job assignment discrimination] even before the effective date of Title VII" (App. 41a). In March, 1965, an arbitrator ruled that the Company had violated the collective bargaining agreement by denying promotion to blacks who sought to exercise their departmental seniority to claim vacancies in the then all-white Rivet Driver job (App. 27a and n. 3; 121a).[29] Spurred by the arbitration award, the Company abandoned its practice of job segregation (App. 121a-122a).[30]

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[28] The overwhelming majority of blacks were in integrated departments (see *supra*, at 6-7). In most of these departments blacks as a class had substantially greater departmental seniority than whites. (This can be seen by reviewing P. Ex. 12 (1978 Trial), the 1957 seniority list, with the knowledge that the Company had assigned badge numbers 1-1999 to blacks, and 2000 up to whites.) See, e.g., Maintenance Dept., Railroad Dept. Miscellaneous Stores Dept., Paint and Shipping Track Dept., Press Dept., Punch and Shear Dept., Steel Construction Dept., Steel Erection Dept., Steel Stores Dept., and Wood Erection Dept.

[29] The arbitration award in Un. Exh. 508, introduced at the 1974 Trial, and is in the record before this Court. The Company had assigned riveting work in the Steel Erection Department to three whites who were in the Wood Erection Department, notwithstanding that there were blacks in the Steel Erection Department who desired the work. The union argued, and the arbitrator found, that as the black claimants had departmental seniority in the Steel Erection Department, and the employees awarded the job did not, the Company had violated the seniority provision of the agreement (*id.* at 2).

[30] Blacks began moving into traditionally "white" jobs in substantial numbers following that award (App. 121a-122a, 53a, 55a-56a). As a black employee who was then Vice-President of the Local and later became its President (JA 53) testified, the award "was a ground breaker for the entire plant" (*ibid*).

Respondents had attacked two basic components of the seniority system: first, they claimed that the adoption of departmental service, rather than plant service, as the *measure* of seniority was motivated by a discriminatory purpose; second, they claimed that the departments within which seniority was applied were *shaped* by a discriminatory purpose. The court found that in both respects the decisions made at this plant were rational and conformed to those made throughout the railroad equipment industry, including those made at plants which were virtually all-white and in which race could not have been a determinative factor.

With respect to the choice of departmental seniority rather than plant seniority as the *measure* of seniority, the court found, from record evidence consisting of "publications of the Department of Labor, arbitration awards, decisions of the War Labor Board, various collective bargaining agreements, and contemporaneous studies made by [the Company] at the time of contract negotiations" that "seniority by departmental age such as found at Bessemer was the modal form of agreements generally, as well as with manufacturers of railroad equipment in particular" (App. 33a).[21] Departmental seniority was also used in the Company's other major plant, in Butler, Pa., "where less than 1% of the employees were black" (*ibid.*), and at its plant in Hammond, Ind., "also having a small percentage of black employees" (*ibid.*).[22]

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[21] The record evidence supporting this finding appears at JA 320-335, 275-285. Department of Labor studies of seniority provisions in collective bargaining agreements concluded that plant-wide seniority systems were "most prevalent in shops in which all employees follow the same craft or in plants where the jobs are more or less interchangeable," while "[i]n larger establishments where operations are more varied, it is common to establish separate lists on departmental lines or according to job specifications" (JA 325; see also JA 326-327). The plant in this case, of course, was large and had a diversity of operations (see p. 5, *supra*).

[22] JA 206, 317-319 (Butler); JA 242 (Hammond).

With respect to the *shape* of the departments, the court looked for two possible indicators of racial gerrymandering: whether the *number* of departments was abnormally large when compared to comparable plants in the industry, and whether the *configuration* of the departments was irrational and/or different from other plants in the industry. In both respects, the court found the system at this plant to be rational and consistent with those throughout the industry, including at plants where the workforce was virtually all white.

Regarding the *number* of departments (28 in 1954, including 26 in USW's bargaining unit and two in a unit represented by IAM, with no change in subsequent years except that one department in USW's unit became vacant (App. 31a)), the court found as follows:

> While this at first glance appears to be an unusually large number of departments, it must be viewed in the context of the diversity of operations at the plant, the extreme fluctuations in employment levels, and—what is particularly significant—the opportunity to use seniority within the unit for any job without the barrier of any lines of promotion. Given these facts, the failure to require that jobs be fairly closely related to constitute a seniority unit could be expected to produce undue bumpings or displacements, highly inefficient performance, or excessive grievances over ability factors—or all of them.
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> The number of separate departments found at Pullman's Bessemer plant is less than (40 departments) at American Car and Foundry's plant at St. Charles, Missouri, and than that (29 departments) at Eastern Car Company's plant in Nova Scotia. The same number of departments (28) are found at Pullman's plant in Butler, where less than 1% of the employees were black; and the lesser number of departments found at Pullman's plant in Hammond, also having a small percentage of black

employees, should be viewed in the light of the more limited operations there conducted.[10]

[10] The Hammond plant does not build cars. It only provides repair services and produces certain parts and components. [App. 31a, 33a; some footnotes omitted].[33]

Regarding the *configuration* of the departments, the court found that there was a rational explanation for each of the choices that had been made (App. 31a-38a). For example the court noted:

> [T]he . . . creation of a separate Inspection department in the late 1940's, drawing the inspectors from the various operating departments into a separate unit . . . was certainly rational—removing them from responsibility to the very persons whose production they were called upon to inspect. [App. 32a]

Moreover, the configurations were "consistent with practices at other unionized plants throughout the country, at other companies in the same industry, and indeed at Pullman plants located outside the South where race was presumably not a potential consideration" (App. 32a).[34] In particular, the court found that in each instance an identical configuration existed "at either the Hammond or Butler plants, or both" (App. 37a).[35] The court ultimately concluded on this subject:

> While it is appropriate to view, as this court has done, the systems under a microscope, the ultimate objective is to comprehend the gestalt of the system. Here, from either perspective, the court finds the departmentalization at Pullman to be rational, in accord with the industry practice, and consistent with NLRB policies. [App. 37a-38a].

[33] See JA 329-330, 305-312, 206, 317-319, 242.

[34] The court had before it evidence respecting the departmental structures of numerous plants in the railroad equipment industry. See, e.g. JA 242, 305-312, 317-319, 329-330, 332-333.

[35] The departmental configurations at the Butler plant appear at JA 317-319, 206, and at the Hammond plant at JA 242.

b. *Findings As To Respondents' Contentions That Discriminatory Motivation Should Be Inferred From Evidence Concerning Matters Other Than The Seniority System*

In the face of the affirmative evidence of innocent motivation recounted above, and lacking any direct evidence that the seniority system had been discriminatorily motivated, respondents asked the court to infer discriminatory motivation from certain other evidence.

First, respondents pointed to the fact that the seniority system had been adopted at a time when the Company engaged in overt racial discrimination with respect to many employment practices, including job assignments. Respondents contended that an inference should be drawn that the animus prompting these other forms of discrimination also had influenced the construction of the seniority system. The court recognized that absent explanation such an inference could be drawn from "the apparent pervasiveness of such [other] discrimination" (App. 39a), but declined to do so here because the evidence showed that the seniority system was the product of USW's aims and policies, not the Company's; USW's policies were "colorblind", and blacks had had an equal voice with whites in determining the form of the seniority system—a subject on which employees had not divided along racial lines (App. 39a-41a; see pp. 9-13, *supra*).

Second, respondents argued that blacks as a class were disproportionately assigned to the less desirable departments, that the opportunity to carry seniority from one department to another would have meant more to blacks than to whites, and, consequently, despite the system's facial neutrality, discriminatory purpose should be inferred from the fact that the system did not provide for carryover of seniority upon transferring from one department to another. The court concluded that the inference was not warranted, explaining:

> Such an analysis may, indeed, be useful in the process of evaluating circumstantial evidence. If, to take an extreme example, a seniority rule were shown to penalize all blacks and no whites, the inference that the rule was racially motivated would seem compelled. Where, however, as here, a rule affects significant numbers of both white and black employees—and does so in an identical manner—it would be a misreading of *Teamsters*, in this court's view, to determine "neutrality" on the basis of its quantitative effects. [App. 29a].[26]

Third, respondents contended that the court should infer discriminatory motivation in USW's seniority system from the facts surrounding the creation immediately following unionization of two separate Die & Tool Departments and two separate Maintenance Departments, where prior to unionization there had been only one of each department. The court found such an inference unwarranted. The court began by describing the circumstances which led to the splitting of these departments:

> The existence of these divided departments is due to actions of the NLRB in 1941, when it—at the request of other petitioning unions—divided the plant into three representational units for election purposes. This was done over the opposition . . . of the USW, which sought to represent all production and maintenance employees. The company properly adopted a "hands-off" attitude on formulation

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[26] On this point, the Court noted that assessing the relative effect of the rule upon whites and blacks would require "ranking the . . . departments according to some perceived order of desirability," a process which, on the facts of this case, might or might not reflect a disparate effect upon blacks depending upon the assumptions used to determine the relative desirability of departments (App. 29a-30a). The court noted that in an earlier opinion in this case it had found, using various sets of such assumptions, that blacks were not disadvantaged vis-a-vis whites in their departmental assignments (App. 30a, 127a-130a).

of election units. Three separate election units were formed by the NLRB, with the International Brotherhood of Electrical Workers gaining representation status (over the USW) for two small departments, with the IAM gaining representation (over the USW) for five other departments, and with the USW gaining representation (over the Federal Labor Union) for the bulk of the employees. The unit formed by the NLRB as to which the IAM gained recognition was one which included certain positions in the Die & Tool and Maintenance departments considered by the NLRB as involving craft and craft-related jobs, but which omitted other positions in those departments, they being in the unit for which the USW gained recognition. Hence—and it is difficult to understand how the company and the USW could have legally done otherwise—it resulted that there were two Die & Tool seniority units and two Maintenance seniority units, each subpart being represented by a different union. The separation into different bargaining units was not merely, as in Teamsters, "consistent with National Labor Relations Board precedents," 431 U.S. at 356, 14 FEP Cases at 1527; it was rather required by a specific decision of the NLRB and the outcome of the elections. [App. 35a-36a; footnote omitted].[37]

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[37] USW, in 1941, filed a petition with the NLRB seeking certification as the exclusive bargaining representative "of all production and maintenance employees, exclusive of foremen, superintendents and clerical forces" (JA 288). Two craft unions—the International Brotherhood of Electrical Workers ("IBEW") and the International Association of Machinists ("IAM")—intervened, seeking separate NLRB elections in units of the craft and craft-related employees within their respective jurisdictions (JA 107-109, 155). The battle-lines were thus drawn "between the newly-formed CIO [of which USW was part], with its strategy of heterogeneous, plant-wide industrial organization, and the older AFL, with its traditional approach of organizing separate homogeneous craft unions." *Terrell v. United States Pipe & Foundry Co.*, 644 F.2d 1112, 1116 (5th Cir. 1981). USW urged the NLRB *not* to conduct

USW and IAM negotiated separate collective bargaining agreements with the Company for their respective bargaining units, containing separate (and different) seniority systems (J.A. 167-169, 180-181). The court was unwilling to infer that discriminatory motive was the explanation for the unions' confining their respective seniority systems to the employees in their respective bargaining units:

> If there was any industry practice to combine positions represented by different unions into the same seniority unit, this court was certainly not presented with evidence to that effect. [App. 37a].

Fourth, respondents argued that discriminatory motivation in USW's seniority system should be inferred because in two successive transfers, in 1941-1942 and in 1944, USW took into its bargaining unit most of the jobs that the NLRB originally had certified in the IAM unit, leaving IAM only with two all-white departments. Respondents contended that IAM was motivated in ceding these jobs by a desire to rid its unit of black em-

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separate craft elections (JA 107, 291-293), while the Company took no position (JA 155). A lengthy NLRB hearing ensued (JA 105-149), at the conclusion of which the NLRB, finding that "many of the employees in the separate units urged by the I.B.E.W. and the I.A.M. are skilled employees, and all of such employees appear to come under the craft jurisdiction of these two unions" (JA 155) ordered three separate elections: one "among the employees . . . claimed by the I.B.E.W. to constitute an appropriate unit" (JA 156), one "among the employees . . . claimed by the I.A.M. to constitute an approprate unit" (*ibid.*), and the third among "all production and maintenance employees . . . excluding . . . employees in groups 1 and 2 above" (J.A. 160). IBEW won the election in the first unit, containing 22 employees (JA 161-162), IAM won in the second unit, containing 163 employees (JA 162), and USW won the third, containing 987 employees (*ibid*). The unit for which the IAM was certified included some, but not all, of the employees in the Maintenance and Die & Tool Departments (JA 165-166).

ployees, and that USW agreed to take the jobs to facilitate that objective of IAM.

The court, noting that this suit challenges only the USW seniority system, and not IAM's (App. 35a, 42a),[28] was unwilling to infer from the record evidence respecting these transactions that the USW seniority system was discriminatorily motivated:

> Plaintiffs view the evidence as showing that the IAM never wanted to represent any black employees and that, by a series of maneuvers including agreements with the NLRB and later a partial ceding of members, it was able to eliminate blacks from its membership, a matter which continued until passage of Title VII. While the objective facts are not greatly

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[28] The original complaint herein did not even name IAM as a defendant (JA 2, 29). On the eve of trial, plaintiffs sought and obtained leave to amend their complaint to add IAM as a Rule 19 defendant "insofar as the relief requested may involve or infringe upon the provisions of such Union's collective bargaining agreement with the Company" (JA 29). The amended complaint added IAM as a defendant to facilitate "complete relief" (JA 21), but continued to allege only that USW's seniority system (and not IAM's) was unlawful:

> "All matters regarding compensation, terms, conditions and privileges of employment of the plaintiffs and the class they represent have been, at all material times to this action, governed and controlled by collective bargaining agreements entered into between the International Union, United Steelworkers, and the Company and/or local supplemental agreements (hereinafter referred to as "agreements") entered into between Local 1466 [of USW] and the Company. *Under and pursuant to the terms of the aforementioned agreements*, the defendants have established a promotional and seniority system, the design, intent and purpose of which is to continue and preserve, and which has the effect of continuing and preserving, the defendants' policy, practice, custom and usage of limiting the employment and promotional opportunity of Negro employees of the Company because of race or color. [JA 20-21; emphasis added]

in dispute, the defendants here do challenge the characterization of the IAM motives, asserting that the changes took place because of initial confusion over which craft and craft-related positions should be properly represented by the IAM and because of subsequent loss of support of the IAM by many of its members.

Whatever the motives of the IAM in the 1941-42 period—the court finds it unnecessary to resolve this factual dispute—the USW cannot be charged with racial bias in its response to the IAM situation. The predecessor of the USW sought to represent all workers, black and white, in the plant. It accepted additional workers of both races into its local after the election, when that opportunity presented itself. Its concurrence in the 1944 agreement, which resulted in still further blacks and whites being added to its ranks, was not due to a desire to confer any benefits upon the all-white IAM remnant; rather, it was refusing to accept those remaining whites because ti viewed them as scabs who had not honored picket lines. * * *

The effort of the plaintiffs to fix responsibility on the company for whatever racial discrimination may have existed in the IAM is likewise without merit. The company properly took a "hands-off" approach towards the establishment of the election units and the subsequent modifications of the representational units. It bargained with those unions which were afforded representational status by the NLRB, and did so without any discriminatory animus. [J.A. 41a-43a][39]

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[39] With regard to this finding we note the following evidence:

(1) No IAM representative ever participated in the negotiation or administration of USW's seniority system; only representatives of the Company and USW participated therein (JA 208, 212, 218, 222, 228, 230, 232-236, 239-240, 254, 256-257, 263, 268, 270). The IAM negotiated separately, with only IAM and Company representatives present (JA 261-262).

(2) Immediately after the NLRB announced its decision to create three separate bargaining units, USW moved for rehearing, contending, *inter alia*, that the IAM unit defined by the NLRB in-

Fifth, respondents asked the court to infer discriminatory motivation in USW's seniority system from the

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cluded "employees who have never heretofore been classed as machinists" and who "work in many diversified and unrelated types of work and are spread in small groups all over the company's plant and have very little in common either from the standpoint of similarity of tasks, rates of pay or degree of skill" (JA 292). After the NLRB elections, and in light of continuing disputes, the NLRB requested that USW and IAM meet in an attempt to agree upon corrected unit definitions (JA 170). The outgrowth of that meeting was an agreement by IAM to cede to USW those employees who were not craftsmen or skilled assistants to craftsmen (JA 170-171). The NLRB thereupon made repeated attempts to secure the Company's acceptance of the transfer of jobs between bargaining units (JA 294). The Company, having determined that so far as the Company's interests were concerned "it doesn't seem . . . to make much difference" which bargaining unit the jobs were in (JA 294), accepted the agreement "[a]ssuming that [it] is satisfactory to the Board, and subject to Board orders" (JA 171). The contraction of the IAM unit to craft and highly skilled jobs resulted in the transfer of a number of blacks (respondents estimate 24, Brief in Opp., p. 7, n.7) from the IAM unit to the USW unit, the Company's assignment discrimination having prevented blacks from securing highly-skilled jobs.

(3) In 1944, USW sought an NLRB election to capture from IAM what was left of the IAM unit. On the eve of the NLRB hearing on USW's petition, a compromise was reached: IAM ceded three of the five departments whose employees it represented to USW, retaining the employees in two departments (App. 36a, 42a; JA 174-176, 336-338; compare JA 172 with JA 177). The basis for this compromise was described by the man who was then the President of the USW Local (JA 337-338). USW told IAM "we are going to take who we want, not what you want to give us" and, regarding the employees in the two departments left to IAM, "I said we didn't want them scabbing son-of-a-bitches, they come across our picket line" (JA 338). The 1944 compromise transferred approximately two-third of the employees formerly in the IAM unit (about 100 out of 150) to the USW unit, including all four blacks who were then in the IAM unit (JA 255).

(4) By these successive actions, and the subsequent acquisition in 1946 of the jobs which the NLRB had certified originally to the IBEW (App. 41a, JA 298-304), USW had by 1946 expanded its bargaining unit to include all employees in the plant except "them scabbing son-of-a-bitches" in the IAM unit.

particular choices that USW and the Company had made in structuring certain departments. As described above, pp. 17-18, the court found in each of these instances that the choice was rational and consistent with practices elsewhere in the industry and concluded that there was no basis for inferring discriminatory motivation.

C. The Court of Appeals' Opinion

The court of appeals reversed the district court's ruling that the USW seniority system was a *bona fide* system protected by § 703(h). Citing the controlling rule in the Fifth Circuit—that because "a finding of discrimination is a finding of ultimate fact . . . we will proceed to make an independent determination, though bound by findings of subsidiary fact which are themselves not clearly erroneous" (App. 15a, n. 6)—the court of appeals premised that reversal on its own "find[ing]" that the system "resulted from an intent to discriminate because of race" (App. 16a). In that court's view: "It is crystal clear that considerations of race permeated the negotiation and adoption of the seniority system in 1941 and subsequent re-negotiation thereafter" (App. 14a). That court explained its finding as follows:

> The obvious principal aim of the I.A.M. in 1941 was to exclude black workers from its bargaining unit. That goal was ultimately reached when maneuvers by the I.A.M. and U.S.W. resulted in an all-white I.A.M. unit. The U.S.W., in the interest of increased membership, acquiesced in the discrimination while succeeding in significantly segregating the departments within its own unit.
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> The district court might have reached a different conclusion had it given the I.A.M.'s role in the creation and establishment of the seniority system its due consideration. No credible explanation has been advanced to sufficiently justify the separate seniority units. The Pullman-Standard plant re-

mains the sole plant within the Pullman family with two separate bargaining units for its production and maintenance workers.

We consider significant in our decision the manner by which the two seniority units were set up, the creation of the various all-white and all-black departments within the U.S.W. unit at the time of certification and in the years thereafter, conditions of racial discrimination which affected the negotiation and re-negotiation of the system, and the extent to which the system and the attendant no-tranfer rule locked blacks into the least remunerative positions within the company. Because we find that the differences in the terms, conditions and standards of employment for black workers and white workers at Pullman-Standard resulted from an intent to discriminate because of race, we hold that the system is not legally valid under section 703 (h) of Title VII, 42 U.S.C. § 2000e-2(h). [App. 15a-16a.]

SUMMARY OF ARGUMENT

It is settled under Title VII that "absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences." The decisive question posed by the plaintiffs' challenge to the seniority system here is whether the requisite "discriminatory purpose" has been proved. The district court answered that question in the negative. The court of appeals, following the rule of the Fifth Circuit that a revewing court may "reverse [a finding of the absence of discriminatory purpose] free of the clearly erroneous rule," reversed the finding of the district court, substituting its own finding that the system was motivated by a discriminatory purpose.

A.

The expansive appellate review indulged in by the court below exceeds that permitted by Rule 52(a), F. R. Civ. Pro. Reliance on the fact findings of the trial courts "is required . . . by the essential nature of trial courts as distinguished from appellate courts." It is thus basic that under the federal rules of procedure the appropriate scope of review depends on whether the appellant claims that the district court misunderstood the *law's* requirements or whether the claim is that the district court's *factual* determinations are inaccurate. The determination that the parties to a seniority system acted with the "discriminatory purpose" made unlawful by § 703(h) requires, first, a determination of what "discriminatory purpose" means in this context as a matter of law, and, second, a determination whether on the facts of the particular case the parties had acted with a "discriminatory purpose" as thus defined. The statement that a determination of "discriminatory purpose" under § 703(h) is solely one of law is incorrect as is the statement that the determination is solely one of fact. The analysis of the meaning of a standard like "discriminatory purpose" is one of law, and if that analysis is properly done the conclusion as to whether the particular defendants before the court acted with that purpose is one of fact.

In the instant case, the court of appeals did not proceed on the theory that the district court misunderstood the meaning of § 703(h). Rather, the issue as to which the district court and the court of appeals reached contrary conclusions was: were the parties who established and maintained the seniority system at Pullman's Bessemer Plant motivated in so doing by a discriminatory purpose. That issue *is* solely one of fact; it is of precisely the same nature as the question in *Dayton Board of Education v. Brinkman*, 443 U.S. 526, 535, which this Court

stated was subject to review under the clearly erroneous standard.

B.

The instant case is a paradigm of the potential inherent in the process of *de novo* appellate fact-finding for creating rather than correcting error. Where the Fifth Circuit and the district judge disagreed, the court of appeals: ignored district court findings that are supported by substantial evidence; made findings of fact that are not supported by any evidence or are supported by less substantial evidence than that relied on by the district judge; and drew inferences that are less rational in the context of the entire record than those drawn by the district judge. The precise office of Rule 52(a) is to prevent the courts of appeals from supplanting careful, conscientious, and considered district court evaluations of the evidence with independent appellate findings of fact. The court of appeals' hopelessly flawed findings here attest to the wisdom of that rule—if such attestation be needed.

Because on this record the finding of "discriminatory purpose" made by the district court could not be upset as clearly erroneous, the appropriate disposition of this case at this point is to reverse the decision of the court below and to remand the case with an instruction to affirm the judgment of the district court that the seniority system does not violate Title VII.

ARGUMENT

It is settled under Title VII that "absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 82; see also *Teamsters v. United States*, 431 U.S. 324, 352. The decisive question posed by the plaintiffs' challenge to the seniority system here is whether the requisite "dis-

criminatory purpose" has been proved.[46] The district court answered that question in the negative, the court of appeals in the affirmative. The latter's decision was arrived at through application of the well-settled approach of the Fifth Circuit to the scope of appellate review in Title VII cases:

> With respect to ultimate findings of fact, we noted in *Industrial Instrument Corp. v. Foxboro Co., supra*, 307 F.2d at 786 n. 2:
>
> > We may reverse free of the clearly erroneous rule where . . . the issue revolves around an ultimate fact question as distinguished from subsidiary fact questions. . . .

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[46] The district court in this case, believing that § 703(h) creates an "affirmative defense," held that defendants had the burden of proving its applicability (App. 25a). While it makes no difference to the outcome of this case, this Court's decisions establish that the burden is on plaintiffs to prove discriminatory purpose, and not on defendants to prove its absence. In *TWA v. Hardison, supra*, 432 U.S. at 83 n. 13, the Court said:

> Here . . . the operation of the seniority system itself is said to violate Title VII. In such circumstances, § 703(h) unequivocally mandates that *there is no statutory violation in the absence of a showing of discriminatory purpose.* [Emphasis added].

See also *United Airlines Inc. v. Evans*, 431 U.S. 553, 558-560; *California Brewers Assn. v. Bryant*, 444 U.S. 598, 610-611.

These rulings follow from the Court's prior holding that § 703(h) is "only a definitional provision"; it "delineates which employment practices are illegal and thereby prohibited and which are not." *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 758. See also *id.* at 761; *Teamsters*, 431 U.S. at 346-347. By "defining" that only seniority systems established or maintained with a discriminatory purpose are illegal, § 703(h) "defines" the violation which it is plaintiffs' burden to prove. "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff," *Texas Department of Community Affairs v. Burdine*, —— U.S. ——, 49 L.W. 4214, 4216 (March 4, 1981).

See also *Galena Oaks Corp. v. Scofield, supra*, 218 F.2d at 219.

Although discrimination *vel non* is essentially a question of fact it is, at the same time, the ultimate issue for resolution in this case, being expressly proscribed by 42 U.S.C.A. § 2000e-2(a). As such, a finding of discrimination or nondiscrimination is a finding of ultimate fact. See *Hester v. Southern Railway Co.*, 5 Cir., 1974, 497 F.2d 1374, 1381; *United States v. Jacksonville Terminal Co.*, 5 Cir., 1971, 451 F.2d 418, 423-24. In reviewing the district court's findings, therefore, we will proceed to make an independent determination of appellant's allegations of discrimination, though bound by findings of subsidiary fact which are themselves not clearly erroneous. [*East v. Romine, Inc.*, 518 F.2d 332, 339 (CA 5, 1975), cited for this point and quoted in the decision below at App. 15a, n. 6].[41]

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[41] In addition to *East* and the instant case, the Fifth Circuit has invoked its "free[dom]" from Rule 52(a) in reviewing, and in almost every case overturning, district court findings of the absence of discriminatory purpose in, *e.g.*, *Causey v. Ford Motor Co.*, 516 F.2d 416 (CA 5, 1975); *Parson v. Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374, 1382 (CA 5, 1978), *cert. denied*, 441 U.S. 968 (1979); *Williams v. Tallahassee Motors, Inc.*, 607 F.2d 689, 690 (CA 5, 1979); *Burdine v. Texas Dept. of Community Affairs*, 608 F.2d 563 (CA 5, 1979), *reversed on other grounds*, —— U.S. ——, 49 L.W. 4214 (1980); *Crawford v. Western Electric Co.*, 614 F.2d 1300 (CA 5, 1980); *Thompson v. Leland Police Dept.*, 633 F.2d 1111, 1112 (CA 5, 1980); *Danner v. United States Civil Serv. Comm'n*, 635 F.2d 427, 430-431 (CA 5, 1981); *Phillips v. Joint Legislative Com.*, 637 F.2d 1014, 1024 (CA 5, 1981). Our research has disclosed no instance in which the Fifth Circuit invoked this broad scope of review in reviewing a district court finding of the *existence* of a discriminatory purpose.

Only one circuit has followed the lead of the Fifth Circuit in holding that Rule 52(a)'s "clearly erroneous" standard is not applicable in reviewing district court findings respecting discriminatory purpose. *Stewart v. General Motors Corp.*, 542 F.2d 445, 449 (CA 7, 1976), *cert. denied*, 433 U.S. 919. Two circuits have expressly disapproved the Fifth Circuit's rule, concluding that Rule 52(a) *does*

Thus, the court below made an "independent determination' of the "ultimate fact" of "discriminatory purpose," and substituted its finding regarding what had motivated the parties to the seniority system for the opposite one made by an experienced district court judge, who had lived with the case for eight years, had heard weeks of testimony, had reviewed hundreds of exhibits, had set forth detailed findings of fact which in every instance were, as we have shown pp. 4-26, supported by substantial evidence, and had on these bases made a careful evaluation of whether the seniority system had in fact been motivated by a discriminatory purpose.

As we now show, the expansive appellate review indulged in by the court below exceeds that permitted by Rule 52(a), F. R. Civ. Pro., which provides in pertinent part:

> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

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control findings of discriminatory purpose. *Sweeney v. Bd. of Trustees of Keene State College*, 604 F.2d 106, 109 n.2 (CA 1, 1979), *cert. denied*, 444 U.S. 1045; *Kunda v. Muhlenburg College*, 621 F.2d 532, 544 (CA 3, 1980) (citing *Sweeney*). And the remainder of the circuits have applied Rule 52(a)'s clearly erroneous standard and not the Fifth Circuit's contrary standard. *Bostic v. Boorstin*, 617 F.2d 871, 875 n.18 (CA DC, 1980); *Duckett v. Silberman*, 568 F.2d 1020, 1023 (CA 2, 1978); *EEOC v. Chesapeake & O. Ry.*, 577 F.2d 229, 233 (CA 4, 1978); *Smith v. South Central Bell Telephone Co.*, 518 F.2d 68, 69 (CA 6, 1975); *Kendrick v. Comm. of Zoological Subdistrict*, 565 F.2d 524, 526-527 (CA 8, 1977); *Garval v. Arthur G. McKee*, —— F.2d ——, 25 FEP Cases 1565, 1567 (CA 9, 1981); *Silberhorn v. General Iron Works Co.*, 584 F.2d 970, 971 (CA 10, 1978).

A.

1. The Advisory Committee on the original federal procedural rules noted:

> The rule stated in the third sentence of *Subdivision* (*a*) accords with the decisions on the scope of the review in modern federal equity practice. It is applicable to all classes of findings in cases tried without a jury whether the finding is of a fact concerning which there was conflict of testimony, or of a fact deduced or inferred from uncontradicted testimony. [5A Moore's Federal Practice, ¶ 52.01 [2], p. 2605]

This reliance on the fact findings of the trial courts "is required . . . by the essential nature of trial courts as distinguished from appellate courts." 9 Wright and Miller, Federal Practice and Procedure, § 2587, p. 748. The trial judge has a superior opportunity to learn the record in minute particularity, to view the disputants, to understand a complex case in its entirety, and to place the various aspects of the matter in proper perspective. He is the one immersed in the case over a substantial period of time. The appellate judge in contrast is presented with only discrete elements of the controversy which are distilled through presentation in briefs subject to page limitations and in a short period of oral argument. Moreover, as Wright and Miller emphasize:

> Even in instances where an appellate court is in as good a position to decide as the trial court, it should not disregard the trial court's finding, for to do so impairs confidence in the trial courts and multiplies appeals with attendant expense and delay. The matter was clearly stated by Judge John B. Sanborn for the Eighth Circuit:
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> > The entire responsibility for deciding doubtful fact questions in a nonjury case should be, and we think it is, that of the district court. The

> existence of any doubt as to whether the trial court or this Court is the ultimate trier of fact issues in nonjury cases is, we think, detrimental to the orderly administration of justice, impairs the confidence of litigants and the public in the decisions of the district courts, and multiplies the number of appeals in such cases.
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> • • • •
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> [T]he Ninth Circuit in 1962 in the case of Lundgren v. Freeman . . . said:
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> • • • •
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> Nothing in the history of review of equity cases or of law cases tried without a jury suggests that the appellate court ever decides issues of fact in the first instance, even where it considers itself as fully qualified as the trial judge to do so. Rule 52(a) should be construed to encourage appeals that are based on a conviction that the trial court's decision has been unjust; it should not be construed to encourage appeals that are based on the hope that the appellate court will second-guess the trial court. [*Id.* at pp. 748-749.]

This Court's words in *United States v. Real Estate Boards*, 339 U.S. 485, 495-496, are in point here:

> It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent. See *United States v. Yellow Cab Co.*, 338 U.S. 338, 342; *United States v. Gypsum Co.*, 333 U.S. 364, 394-395. We are not given those choices, because our mandate is not to set aside findings of fact "unless clearly erroneous."

2. The question whether a "discriminatory purpose" has been proved under § 703(h) of Title VII, like any question whether a component of a legal claim has been proved, involves an element of law and an element of fact.

In reviewing whether a "conspiracy in restraint of trade" under the Sherman Act had been proved, this Court, in the oft-cited case of *United States v. Gypsum Co.*, 333 U.S. 364, 394, explained:

> In so far as [the District Court's] Finding 118 [that no conspiracy in restraint of trade had been proved] and the subsidiary findings were based by the District Court on its belief that the *General Electric* rule justified the arrangements or because of a misapplication of *Masonite* or *Interstate Circuit*, errors of law occurred. These we can, of course, correct. In so far as this finding and others to which we shall refer are inferences drawn from documents or undisputed facts, theretofore described or set out, Rule 52(a) of the Rules of Civil Procedure is applicable. That rule prescribes that findings of fact in actions tried without a jury "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

The insight of the *Gypsum* opinion was given added content in a later antitrust conspiracy case, *United States v. Parke Davis & Co.*, 362 U.S. 29, 43-44:

> The District Court in this case apparently assumed that the Government could prevail only by establishing a contractual arrangement, albeit implied, between Parke Davis and its customers. Proceeding from the same premise Parke Davis strenuously urges that Rule 52 of the Rules of Civil Procedure compels an affirmance of the District Court since under that Rule the finding that there were no contractual arrangements should "not be set aside unless clearly erroneous." But Rule 52 has no application here. The District Court premised its ultimate finding that Parke Davis did not violate the Sherman Act on an erroneous interpretation of the standard to be applied. . . . [W]hether an unlawful combina-

> tion or conspiracy is proved is to be judged by what the parties actually did rather than by the words they used. See *Eastern States Retail Lumber Dealers' Assn. v. United States*, 234 U.S. 600, 612. Because of the nature of the District Court's error we are reviewing a question of law, namely, whether the District Court applied the proper standard to essentially undisputed facts.

It is thus basic that under the federal rules of procedure the appropriate scope of review depends on "the nature of the District Court's [asserted] error": on whether the appellant claims that the district court misunderstood the law's requirements or whether the claim is that the district court's factual determinations are inaccurate. In jury trials, of course, questions of law and questions of fact are separated and delegated respectively to the judge and to the jury, and no apeal lies to review the findings made by the latter body. In non-jury trials, the same separation between the legal and factual elements of the claim must be made for purposes of determining the appropriate scope of appellate review. This parallel was expressly recognized in *Commissioner v. Duberstein*, 363 U.S. 278, 291:

> Where a jury has tried the matter upon correct instructions, the only inquiry is whether it cannot be said that reasonable men could reach differing conclusions on the issue. *Baker v. Texas & Pacific R. Co., supra*, at 228. Where the trial has been by a judge without a jury, the judge's findings must stand unless "clearly erroneous." Fed. Rules Civ. Proc., 52(a). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395. The rule itself applies also to factual inferences from undisputed basic facts, *id.*, at 394, ...

Given these principles, the determination that the parties to a seniority system acted with the "discriminatory purpose" made unlawful by § 703(h) requires, first, a determination of what "discriminatory purpose" means in this context as a matter of law, and, second, a determination whether on the facts of the particular case the parties had acted with a "discriminatory purpose" as thus defined. The statement that a determination of "discriminatory purpose" under § 703(h) is solely one of law is incorrect as is the statement that the determination is solely one of fact. The analysis of the meaning of a standard like "discriminatory purpose" is one of law, and if that analysis is properly done the conclusion as to whether the particular defendant before the court acted with that purpose is one of fact. Thus, in *Dayton Board of Education v. Brinkman*, 443 U.S. 526, 535, in the context of a claim of discrimination in violation of the Fourteenth Amendment, this Court recognized that the question whether a particular defendant has taken certain actions with an intent to discriminate is one of fact, reviewable under the clearly erroneous standard:

> The Court of Appeals expresaly held that, "at the time of *Brown I*, defendants were intentionally operating a dual school system in violation of the Equal Protection Clause of the fourteenth amendment," and that the "finding of the district court to the contrary is clearly erroneous." 583 F.2d, at 247 (footnote omitted). On the record before us, we perceive no basis for petitioners' challenge to this holding of the Courtof Appeals.[8]

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[8] We have no quarrel with our Brother STEWART'S general conclusion that there is great value in appellate courts showing deference to the fact-finding of local trial judges. *Ante*, at 470-471. The clearly erroneous standard serves that purpose well.[42]

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[42] See also, e.g., *United States v. Oregon Med. Soc.*, 343 U.S. 326, 330-332 (review of finding on existence of antitrust conspiracy gov-

In the instant case, the court of appeals did not proceed on the theory that the district court misunderstood the meaning of § 703(h). Rather, the issue as to which the district court and the court of appeals reached contrary conclusions was: were the parties who established and maintained the seniority system at Pullman's Bessemer Plant motiviated in so doing by a discriminatory purpose. That issue *is* solely one of fact; it is of precisely the same nature as the question in *Dayton* which this Court stated was subject to review under the clearly erroneous standard.

B.

The instant case is a paradigm of the potential inherent in the process of *de novo* appellate fact-finding for creating rather than correcting error. As we now show, where the Fifth Circuit and the district judge disagreed, the court of appeals: ignored district court findings that are supported by substantial evidence; made findings of fact that are not supported by any evidence or are supported by less substantial evidence than that relied on by the district judge; and drew inferences that are less rational in the context of the entire record than those drawn by the district judge.

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erned by Rule 52); *McAllister v. United States*, 348 U.S. 19, 20-23 (review of finding on negligence governed by Rule 52); *United States v. duPont & Co.*, 351 U.S. 377, 381 (review of finding on monopolization governed by Rule 52); *Peurifoy v. Commissioner*, 358 U.S. 59, 60-61 (review of finding on whether employment is temporary or indefinite governed by Rule 52); *Guzman v. Pichirilo*, 369 U.S. 698, 702-703 (review of finding on whether a ship is under a demise charter governed by Rule 52); *Wright v. Rockefeller*, 376 U.S. 52, 56-58 (review of finding on motive in drawing district lines governed by Rule 52); *Zenith Corp. v. Hazeltine*, 395 U.S. 100, 123 (review of finding of damage from an antitrust violation governed by Rule 52); *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 75-77 (review of finding on whether a plant would be completed governed by Rule 52).

Normally, the findings of fact of the district court mark the starting point for analysis under the clearly erroneous standard. In this case, the core "subsidiary" findings of the district court that led that court to find no discriminatory purpose may be summarized as follows:

(1) In every respect the seniority system was, and always had been, race-neutral on its face and "applied equally to all races and ethnic groups. . . . To the extent the system 'locks' employees into a department and discourages transfers, it does so equally for both white and black. . . ." See *supra* at 9.

(2) The system was the "product" of the "aims and policies" of a union in which blacks have always played a major role. In every round of negotiations, black employees and white employees participated in equal or virtually equal numbers on the union negotiating committee, and black employees were critical participants in every decision from the institution of the system through each modification of an aspect of the system. The system "has been negotiated and maintained by blacks, no less than whites." See *supra* at 9-13.

(3) The detailed contemporaneous minutes of the negotiations concerning the establishment of the seniority system and its modification from time to time contained no indication that there was any intent to discriminate on the basis of race. See *supra* at 13-14.

(4) At the time the measure of seniority (departmental age) used in the system was adopted, that measure was the "modal" choice in industrial agreements generally and in the railroad equipment manufacturing industry in particular, including in agreements at plants in the railroad equipment industry that were virtually all-white. See *supra* at 16.

(5) The separation of the plant into departments had occurred prior to unionization, the departments having been established by the Company for operational purposes. A few changes were made in these departmental configurations upon and subsequent to unionization; each such change was rational—a number having resulted from the bargaining unit determinations made by the NLRB—and not based upon racial considerations. See *supra* at 5, 17-18, 20-22.

(6) With the exception of the splitting of certain departments as a result of the NLRB's determination to establish three separate bargaining units, represented by three different unions, the departmental configurations as they finally evolved were fully in accord with industry practice, including the practice at plants that were virtually all-white. See *supra* at 16-18, 20-22.

None of these findings was found by the court of appeals to be clearly erroneous. And, as set forth *supra* at 4-26, each of these findings was supported by substantial record evidence.

The court of appeals' discussion of the motivation of the seniority system is composed of two parts. That court began by restating the district court's findings, interspersing the narrative with observations and qualifications of its own (App. 10a-14a). Then the court below stated its "finding" of "discriminatory purpose" and in three paragraphs explained its basis for that "finding". App. 15a-16a set out at pp. 26-27, *supra*. That explanation does not advert to, much less refute, the district court's core findings just restated as numbers 2 and 3 and 4.[43]

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[43] The court of appeals recited the essence of finding 2 earlier in its opinion (App. 13a) but made no mention of that finding in its analysis. A significance of of that finding, *inter alia*, is that it defeats any inference respecting the motivation of the seniority system that could be drawn from the fact that at the time the

With regard to finding 1, the court of appeals did not dispute that the system was race-neutral on its face and applied equally to blacks and whites, but stated that the effect of the system was to "lock[ ] blacks into the least remunerative positions within the company" (App. 16a).[44]

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system was established the Company was engaged in other forms of discriminatory conduct. We note that in any event there would be a serious question whether the motivation of a seniority system may be established by reference to other employment practices of the employer or union. Because a facially neutral seniority system is vulnerable to attack under Title VII only when it perpetuates prior discrimination, the question of the motivation of the seniority system only arises when the employer has engaged in assignment discrimination. If the fact of such other discrimination were a basis for an inference that the seniority system was discriminatorily motivated, the Congressional purpose which this Court found manifested in § 703(h)—that a neutral seniority system should not be invalidated on the ground of such discrimination (see *Teamsters*, 431 U.S. at 349-355)—could be defeated in every case.

It should be mentioned too that the court of appeals in addition to not disputing finding 4 failed even to suggest any evidence that might have cast doubt on the motivation behind the adoption of departmental age as the system's measure of seniority. The whole thrust of the court of appeals' analysis of the evidence concerns the motivation behind the adoption of certain departmental configurations. Therefore, even were the court of appeals otherwise correct, its analysis would lead only to finding those departmental configurations in violation of Title VII, not to invalidating the entire seniority system including the use of departmental age as the seniority measure. Yet the latter is what the court of appeals did. See App. 16a, 22a.

[44] We put aside here this Court's holding in *Teamsters* that such an effect does not render a seniority system invalid:

> In sum, the unmistakable purpose of § 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII. As the legislative history shows, this was the intended result even where the employer's pre-Act discrimination resulted in whites having greater existing seniority rights than Negroes. Although a seniority system inevitably tends to perpetuate the effects of pre-Act discrimination in such cases, the congressional judg-

The record, however, does not support the court of appeals' "finding" that the system had such an effect. It is undisputed, as we have noted, that until 1965 the Company did assign employees to particular jobs on a discriminatory basis.[45] But, as the district court found, for the vast majority of black employees who had been discriminatorily assigned the seniority system provided both the means to end that discrimination and the means to reach "one's 'rightful place'." See *supra*, 7-8. As of 1965, 96% of the black employees and 93% of the white employees were in integrated departments. See *supra*, 7. To the extent blacks had previously been assigned to inferior jobs within those departments, the system gave them the right to use their seniority in the department to compete without restriction for any job in the department. As the district court found:

> The major impediment to employment opportunities for blacks . . . was removed prior to the effective date of Title VII by the very instrument under attack here, i.e., the seniority system. That system did not provide . . . barriers to the reaching of one's "rightful place" as is typically provided by lines of progression. [App. 43a]

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ment was that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act. [431 U.S. at 352-353; see also 431 U.S. at 349-350, 353-354]

[45] The court of appeals twice asserted that "the first U.S.W. contract . . . excluded blacks from the better jobs" (App. 12a, 14a). These assertions are contrary to the record; the contracts are in evidence and reflect that neither the first USW contract, nor any that followed, contained any racial designation of jobs. (The district court found, with ample record support, that USW did not "foster the discrimination—of treating certain jobs as being for one race or the other—which was being practiced by custom in the plant" (App. 41a)).

It is apparent too from the fact that the vast majority of both whites and blacks were in integrated departments—and that whites were dispersed among virtually all departments (App. 128a)—that any disincentive to transfer to another department flowing from the use of departmental age as the measure of seniority affected members of both races in the same manner. Moreover, while some departments may have had greater proportions of blacks than others, the record does not establish that the departments with higher proportions of blacks were "the least remunerative departments" as the court of appeals repeatedly asserts. See App. 10a, 12a. In its initial opinion, the district court had prepared a chart that showed "that blacks were not disproportionately assigned to less desirable departments," and it concluded that the basis for ranking departments on the chart—the job class range within the department—was a "rough index of earnings potentials in the absence of other more reliable data" (App. 82a, 128a, 127a n. 27). The court of appeals in its first opinion had held that this " 'rough index' conclusion . . . is not clearly erroneous" (App. 82a-83a). In its second opinion, issued after *Teamsters*, the district court found it unnecessary to address further the issue of the relative desirability of departments; it was enough to dispel any possible inference of discriminatory motive that "significant numbers of both white and black employees" were affected "in an identical manner" by the "lock-in" effects of the system (App. 29a). The court went on, however, in *dictum*, to observe that a conclusion that "a somewhat greater impact was felt by blacks than by whites . . . is by no means certain" (App. 30a). With this background, the court of appeals' bare assertion that blacks were assigned to "the least remunerative departments" is inexplicable.

With respect to finding 5, the court of appeals in effect made its own contrary "finding" without any determination that the finding of the district court was clearly erroneous. Thus, for example, the court of ap-

peals stated that "[t]he record evidence indicates that a significant number of one-race departments were established upon unionization . . . and, during the next twenty-five years, one-race departments were carved out of previously mixed departments" (App. 11a). That court went on to term the creation of these departments "arbitrary" (App. 12a) and to "find" that "[t]he establishment and maintenance of the segregated departments appear to be based on no other considerations than the objective to separate the races" (App. 11a).

In fact, the record shows, that within the USW bargaining unit, the only changes upon unionization from the Company's pre-existing operational departments were changes in three departments that resulted from the NLRB's definition of that bargaining unit: jobs were not included in three departments under the USW contract because those jobs were not within the USW bargaining unit as defined by the NLRB. See App. 35a-36a; see also Brief Appendix bound herewith (hereinafter cited as: "Br. App.") 8a-10a. In two of the three instances "one-race" departments resulted, involving a combined total of six employees. Br. App. at 8a-10a. Subsequent to unionization, a small number of new departments were created, for a variety of reasons. Four of these, with a combined total of less than 40 employees, were one-race departments. *Id.* at 10a-16a. In each case, the district court found upon substantial evidence that the department was established for legitimate reasons having nothing to do with race. *Id.* at 10a-16a.

Nowhere did the court of appeals acknowledge the overriding fact that at all times the vast majority of both black and white employees were in integrated departments: for examples, in 1947, 97% of all employees were in integrated departments, and in 1965, 96% of the blacks and 93% of the whites were in such departments. *Id.* at 10a-11a. Nor did the court mention that following

unionization several departments that had previously been one-race departments were integrated. *Id.* at 10a.

The court of appeals did not dispute finding 6 of the district court findings restated above at p. 40, *supra*, but instead focused on the differences in departmental structure as between the Bessemer plant and other plants that resulted from the NLRB's decision establishing separate bargaining units, as if those differences were somehow probative of the intent of the parties to the seniority system, USW and the Company (App. 11a). In this connection, the court of appeals also made the following "findings" (App. 12a, 14a):

> The evidence further indicates that the Pullman-Standard plant is the only one in the Pullman family with two separate bargaining units for its production and maintenance workers.
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> No credible explanation has been advanced to sufficiently justify the separate seniority units. The Pullman-Standard plant remains the sole plant within the Pullman family with two separate bargaining units for its production and maintenance workers.

But the district court had offered not only a "credible explanation," but the only plausible explanation the record allows: separate bargaining units resulted because the NLRB, based on its criteria for defining appropriate bargaining units, had divided the plant into three separate election units, and a different union prevailed in each unit. A result was that certain pre-existing operational departments which overlapped the bargaining units as defined by the NLRB had to be divided; in the words of the district court, "[h]ence—and it is difficult to understand how the company and USW could legally have done otherwise—it resulted that there were two Die & Tool and two Maintenance seniority units, each subpart being represented by a different union" (App. 36a). The

implication of the court of appeals that the effects of the NLRB certification on the structure of the seniority system are indicative of a discriminatory intent is irrational.

In this regard, it should be emphasized that from the beginning USW was the adversary of the IAM and the IBEW, the two AFL craft unions certified initially as bargaining representatives for certain of the employees at the Company's Bessemer plant. The contemporaneous documents (including the transcript of the NLRB hearing in 1941) establish beyond question, as the district court found,[46] that USW sought from the beginning to represent *all* of the production and maintenance employees in a single bargaining unit (JA 107, 288; App. 42a). While USW was initially unsuccessful in achieving that objective, it did not abandon its goal; as the district court found, by 1946 USW had acquired all of the jobs in the IBEW unit, and all of the jobs in the IAM unit except those held by employees who USW did not want because they had "scabbed" on USW strikes. See *supra* at 23-24, and n. 39. The vast majority of those whose jobs thus were transferred into the USW bargaining unit were white—124 of the 152 employees who were transferred were white. See *supra* at 23-24, and n. 39; Br. App. 7a-8a, n. 3. Nonetheless, the court of appeals focused solely on the first of the transfers of jobs from the IAM unit to the USW unit, in 1941-1942, which had the result of shifting approximately 24 black employees into the USW unit. The district court found, and the court of appeals grudgingly acknowledged that USW's motivation in the 1941-1942 transfer was "in the interest of increased membership." App. 16a; see *supra* at 24.

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[46] Despite the finding of the district court and the contemporaneous evidence, the court of apeals states that USW "allegedly" opposed the division of the plant into separate NLRB election units (App. 11a).

The totality of the events, just described, corroborates that finding. The district court added that "the USW cannot be charged with racial bias in its response to the IAM situation." See *supra* at 24.

In this light, the surpassing significance the court of appeals accorded to the "role" of the IAM is puzzling (App. 13a-14a, 16a):

> The district court's failure to recognize the I.A.M. as a party to the present case blemishes its consideration of the genesis of the seniority system. . . . The motives and intent of the I.A.M. in 1941 and 1942 are significant in consideration of whether the seniority system has its genesis in racial discrimination. The I.A.M. was one of the unions which unionized the company in 1941 and the evidence reflects that the I.A.M. manifested an intent to selectively exclude blacks from its bargaining unit, N.L.R.B. certification considerations notwithstanding.
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> The district court might have reached a different conclusion had it given the I.A.M.'s role in the creation and establishment of the seniority system its due consideration.

We have already discussed "IAM's role in the creation and establishment of [USW's] seniority system": IAM, over USW's opposition, successfully sought a separate NLRB election among certain craft and craft-related employees, and prevailed in that election. Thereafter, IAM negotiated its own collective agreement with its own seniority system for its unit. IAM did not participate in the USW negotiations. Subsequently, two thirds of the jobs in its unit—most of which were held by white employees—were transferred to USW's unit. See *supra* at 23-24, and n. 39. The complaint in this case challenged *only* the seniority system established by USW and the Company, not whatever system IAM and the Com-

pany established for the IAM unit. See *supra* at 23, n. 38. And, the district court accordingly treated this case as involving only a challenge to the USW system. See *supra* at 23. The district court's finding that the actions of IAM, regardless of IAM's motives (which are less than clear on this record (see Br. App at 7a-8a, n. 3)), shed no light on whether the USW system was motivated by a discriminatory purpose is on this record unimpeachable. The court of appeals' "finding" to the contrary, once again, is irrational. The proposition that a competitor's motive is to be attributed to his opponent defies both reason and common sense.

Indeed, as our demonstration to this point shows, the "findings" on which the court of appeals rested its "ultimate finding" of discriminatory purpose (see App. 15a-16a quoted *supra* at 26-27), had they been made by a district court, could not survive review under the clearly erroneous standard. The precise office of Rule 52(a) is to prevent the courts of appeals from supplanting careful, conscientious, and considered district court evaluations of the evidence with independent appellate findings of fact. The court of appeals' hopelessly flawed findings here attest to the wisdom of that rule—if such attestation be needed.

Because on this record the finding of "discriminatory purpose" made by the district court could not be upset as clearly erroneous, the appropriate disposition of this case at this point is to reverse the decision of the court below and to remand the case with an instruction to affirm the judgment of the district court that the seniority system does not violate Title VII.

CONCLUSION

For the foregoing reasons, the decision of the Fifth Circuit should be reversed and the case remanded with an instruction to that court to affirm the judgment of the district court that the seniority system does not violate Title VII.

Respectfully submitted,

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APPENDIX

APPENDIX

THE FOUR FACTS WHICH THE COURT OF APPEALS DECLARED "SIGNIFICANT IN OUR DECISION," AND A COMPILATION OF THE RECORD EVIDENCE RELATING THERTO

The court of appeals invalidated the USW seniority system on the basis of its finding ("we find") that the system was negotiated and maintained with a discriminatory purpose. In reaching that finding, the court declared four facts "significant in our decision" (App. 16a). This appendix sets out the district court findings and the record evidence that relate to those four facts.

(1) "[T]he Manner by Which the Two Seniority Units Were Set Up"

A major part of the court of appeals' opinion is devoted to the impact that court thought the IAM had had upon the USW seniority system. That impact, the court believed, was manifested in two discrete ways: (1) the creation of two Die & Tool and two Maintenance Departments, and (2) the transfer of certain jobs from the IAM bargaining unit to the USW bargaining unit.

(a) *Creation of Two Die & Tool and Two Maintenance Departments*

The court of appeals' entire discussion of this subject was as follows:

> In attacking the rationality of the seniority units, appellants primarily attacked the two separate Die & Tool Departments and the two separate Maintenance Departments at Pullman-Standard. No similar situations existed at Pullman's other plants.[3] No

[3] At Pullman-Standard, there are two Die and Tool seniority units and two Maintenance seniority units, each subpart being represented by a different union.

such division existed at Pullman-Standard prior to unionization and seniority. The district court placed primary responsibility for this situation on the N.L.R.B. In 1941, at the request of the petitioning unions, the N.L.R.B. divided the plant into three representational units for election purposes. This was allegedly done over the opposition of the predecessors of the U.S.W.,[4] which sought to represent all production and maintenance employees. The district court did not find this circumstance to diminish the bona fides of the seniority system between the company and the U.S.W. The court asserted that the separation within the various units was not, as in *Teamsters*, "consistent with National Relations Board precedent," *Teamsters*, 431 U.S. at 356, 97 S.Ct. at 1965; but was required by a specific decision of the N.L.R.B. and the outcome of the elections. Accordingly, the court found the departmentalization at Pullman-Standard to be rational, in accord with industry practice, and consistent with N.L.R.B. policies.

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The evidence further indicates that the Pullman-Standard plant is the only one in the Pullman family with two separate bargaining units for its production and maintenance workers.

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The district court might have reached a different conclusion had it given the I.A.M.'s role in the creation and establishment of the seniority system its due consideration. No credible explanation has been advanced to sufficiently justify the separate seniority units. The Pullman-Standard plant remains the sole plant within the Pullman family with two

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[4] The United Steelworkers (USW) evolved from the Steelworker's Organizing Committee (SWOC).

> separate bargaining units for its production and maintenance workers. [App. 11a, 12a, 16a.][1]

It is true that Bessemer is the "only [plant] in the Pullman family with two separate bargaining units" (App. 12a, see also 16a). But the record contains a readily apparent "credible explanation . . . to sufficiently justfy" that separation: the mandate of a government agency—the NLRB—decreeing separate bargaining units.

It is likewise true that "prior to unionization" there was only one Die & Tool Department and one Maintenance Department at Bessemer, and that the bifurcated departments which eventuated following unionization have no analogue at Pullman's other plants. But as the dis-

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[1] The statement that the USW "allegedly" opposed the NLRB's division of the plant into three bargaining units, App. 11a, illustrates the court of appeals' unfamiliarity with the record. The record contains the transcript of the 1941 NLRB hearing at which USW stated its "contention . . . that the unit should consist of an industrial unit in which all production and maintenance employees are eligible" (JA 107), and USWA's motion for rehearing, following the NLRB's decision creating three units, urging the NLRB to "withdraw" that decision and instead create an "industrial unit [containing] all the production and maintenance employees" (JA 291-293).

A similar unfamiliarity is manifested in the treatment of the district court's explanation of why the separate IAM and USW bargaining units here were even more defensible than in *Teamsters*, that "[t]he separation into different bargaining units was not *merely*, as in *Teamsters*, 'consistent with National Labor Relations Board precedents,' 431 U.S. at 356; it was rather required by a specific decision of the NLRB and the outcome of the elections," App. 36a (emphasis added). The court of appeals translated this finding as follows (App. 11a):

> The court asserted that the separation within the various units was not, as in *Teamsters*, 'consistent with National Relations Board precedent,' *Teamsters*, 431 U.S. at 356, 97 S.Ct. at 1865; but was required by a specific decision of the N.L.R.B. and the outcome of the elections.

trict court found, and the court of appeals did not dispute, the NLRB had placed some jobs in each of these departments in the USW unit, and others in the IAM unit (App. 36a). IAM and USW negotiated separately with the Company for separate collective bargaining agreements, in each of which was established a self-contained seniority system embracing only the employees in that unit (JA 167-205). Neither union had a representative at the other's bargaining meetings (JA 208, 212, 218, 222, 228, 230, 232-236, 239-240, 254, 256-257, 261-263, 268, 270). Given the organizing battle then being waged between the CIO (with which USW was affiliated) and the AFL (with which IAM was affiliated), and the bitter rivalry between these two unions at this plant (JA 337-338; see also Br. at 24-25, n. 39 and *infra*, at 6a-7a, and n. 3), the two unions did not jointly negotiate a seniority system providing inter-unit seniority at Bessemer or elsewhere. As the district court concluded, it is difficult to understand what *else* could have been done except to split the departments for seniority purposes along the bargaining unit lines demarcated by the NLRB (App. 36a). And as that court further observed:

> If there was any industry practice to combine positions represented by different units into the same seniority unit, this court was certainly not presented with evidence to that effect. [App. 37a]

While the court of appeals did not explain *why* the creation of the multiple departments warranted an inference that USW's seniority system was discriminatorily motivated, the district court did explain why such an inference was *not* warranted:

> The existence of these divided departments is due to actions of the NLRB in 1941, when it—at the request of other petitioning unions—divided the plant into three representational units . . . This was done over the opposition . . . . of the USW, which sought

to represent all production and maintenance employees. The company properly adopted a "hands-off" attitude on formulation of election units . . .

. . . The collateral attack on the NLRB decision by plaintiffs in this litigation, filed more than twenty-five years later, must fail, if for no other reasons, because the real defendants—the company and the USW—are not chargeable with responsibility for those events and because such matters do not impair the validity of the seniority system to which they did agree. [App. 35a-37a].

(b) *Transfer of jobs from the IAM bargaining unit to the USW bargaining unit*

The court of appeals' entire discussion of this subject is as follows:

As of the date of its certification to represent employees of Pullman-Standard, November 19, 1941, the I.A.M. unit included twenty-four black workers. Shortly thereafter, agreements between the I.A.M. and Steel Workers Organizing Committee (S.W.O.C.)[8] resulted in the I.A.M. giving its black members to the S.W.O.C. in return for two of the S.W.O.C.'s white members, which resulted in the I.A.M. being an all-white bargaining unit.

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The [district] court took into consideration the plaintiffs' contention that the I.A.M. effectively eliminated blacks from its membership. The court dismissed the relevancy of this point by concluding that the U.S.W. cannot be charged with racial bias in response to the I.A.M. situation and that the

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[8] See footnote 4. [The United Steelworkers (USW) evolved from the Steelworkers' Organizing Committee].

U.S.W. sought to represent all workers, black and white, in the plant.

The district court's failure to recognize the I.A.M. as a party to the present case blemishes its consideration of the genesis of the seniority system. Although the I.A.M. is a party to the present case for purposes of relief other than money damages, it is indeed a party. The motives and intent of the I.A.M. in 1941 and 1942 are significant in consideration of whether the seniority system has its genesis in racial discrimination. The I.A.M. was one of the unions which unionized the company in 1941 and the evidence reflects that the I.A.M. manifested an intent to selectively exclude blacks from its bargaining unit, N.L.R.B. certification considerations notwithstanding.

* * * *

The obvious principal aim of the I.A.M. in 1941 was to exclude black workers from its bargaining unit. That goal was ultimately reached when maneuvers by the I.A.M. and U.S.W. resulted in an all-white I.A.M. unit. The U.S.W., in the interest of increased membership, acquiesced in the discrimination . . . [App. 12a, 13a-14a, 15a-16a]

As the district court recognized (App. 42a), the bona fides of *USW's* seniority system do not turn on whether the IAM was badly motivated in 1941-42. This case attacks only *USW's* seniority system, not the separate seniority system negotiated by IAM (see Br. at 23, n. 38). As we have noted, the IAM and USW were rivals, not members of a joint venture, and the evidence is clear that IAM had no voice in negotiating the USW contract.[2]

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[2] While the court of appeals speaks of IAM "giving its black members" to USW, what actually happened is that the jobs held by those blacks were transferred from the IAM bargaining unit to the USW bargaining unit. If, indeed, IAM for reasons of race excluded from its unit jobs held by black employees which belonged

The employees whose jobs were transferred from the IAM bargaining unit to the USW unit were accorded the same seniority treatment as all other employees in the USW unit (App. 42a). There is nothing in the record to suggest that USW was motivated by race in the treatment it accorded those employees under the USW seniority system. Nor does the record suggest that USW's *acceptance* of the transferred jobs was motivated by discriminatory animus. USW pursued with equal vigor acquisition of the jobs held by *white* employees in the IAM and IBEW bargaining units; indeed, the court of appeals agreed with the district court that USW had accepted the transfer "in the interest of increased membership," not out of discriminatory motivation.[3]

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in that unit, those employees might arguably have a claim that *IAM's* seniority system is unlawful insofar as it fails to accord them the seniority credit they would have enjoyed in the IAM unit had their jobs remained there. We say "arguably," because the IAM agreement provides only occupational seniority (JA 177), and consequently the black employees would have had no greater rights to other jobs in the IAM unit had they been kept in that unit than they possess as occupants of jobs in the USW unit. Nor would a contention that IAM's choice of occupational seniority is racially motivated likely succeed: IAM's unit consisted solely of white employees when the choice was made (JA 177; App. 42a ("all white IAM remnant")).

[3] The court of appeals' finding that the reason for the transfer of the jobs in 1941-42 was IAM's desire to rid its unit of blacks is not precluded by this record, but it is by no means compelled. Thus, if the appellate court thought that fact critical to resolution of this case, the appropriate course was to remand to permit the district court (which had noted but passed over the question as irrelevant) to decide it in the first instance. On this record, the likelier explanation for the 1941-42 transfer is that *it was sought by USW, not IAM.* Prior to the transfer, USW had advised the NLRB that it believed the NLRB had placed employees in the IAM unit who did not belong there (JA 292). Thereafter, USW persisted in efforts to gather up *all* the jobs which the NLRB had placed in the IAM and IBEW units (gaining in 1944 jobs held by 96 whites and 4 blacks in the IAM unit, JA 174-175, 255, and in 1946, all of the jobs

(2) "[T]he Creation of the Various All-White and All-Black Departments Within the U.S.W. Unit at the Tim of Certification and in the Years Thereafter"

The second fact which the court of appeals declared "significant in our decision" was the creation of "various" one-race departments in USW's bargaining unit, both "at the time of certification" and "in the years thereafter" (App. 16a). The court of appeals stated its understanding of the record on this point as follows:

> The record evidence indicates that a significant number of one-race departments were established upon unionization at Pullman-Standard, and during the next twenty-five years, one-race departments were carved out of previously mixed departments. The establishment and maintenance of the segregated departments appear to be based on no other considerations than the objective to separate the races. [App. 11a]

(a) *"At the Time of Certification"*

In preparation for the NLRB election, the Company submitted a voting list which, *inter alia*, shows the racial composition of each of the Company's departments immediately prior to unionization (JA 103). That list shows that prior to unionization five small departments were "one-race" departments. The four all-white de-

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in the IBEW unit, held by 28 employees, all white, JA 302, 304; App. 41a. Moreover, at the NLRB hearing prior to the certifications, IAM had expressly claimed all black as well as white employees who worked within its jurisdiction (JA 149). That is not consistent with the court of appeals' declaration, for which the court cited no evidence, that it is "obvious" that the transfer occurred because the IAM wished "to exclude black workers from its bargaining unit" (App. 15a). Those were questions which, if truly pertinent to the resolution of this case, were for the district court to decide in the first instance.

partments—Plant Protection, Lumber Yard, Welding, and Template—collectively contained 94 employees[4] (17% of the 563 whites employed at that time). The only all-black department was the Truck Department, with 14 employees (2% of the 650 blacks employed at that time). 98% of the blacks were in integrated departments.

Coincident with unionization, two new one-race departments were created within the USW bargaining unit: Die & Tool, with 2 black employees, and Janitors, with 4 black employees.[5] Thus, with unionization, the percentage of blacks who were in "one-race" departments rose from 2% to 3%.

The two new one-race departments were a direct product of the NLRB's bargaining unit definitions. The NLRB placed the jobs of all of the whites who had been in the Die & Tool Department in the IAM bargaining unit, but placed the jobs of the two black employees in the USW unit (JA 165-166).[6] The white employees who had been in a department with the janitors all were clerical employees who were excluded by the NLRB from *all* bargaining units (JA 104, 165-166), and USW thus had no right to include them under its seniority system.

Following unionization, then, 97% of the blacks were in integrated departments. The one-race departments which the Company had established prior to unionization obviously were not shaped with seniority in mind; they had been established for operational purposes (JA 114-

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[4] Plant Protection, 12 employees; Lumber Yard, 29 employees; Welding, 50 employees; and Template, 3 employees.

[5] By reference to JA 104, the four blacks in the Superintendence Department became the Janitors Department, and by reference to JA 103, the two blacks in the Die & Tool Department became the USW Die & Tool Department.

[6] As described *infra*, the Die & Tool Department became integrated in 1946.

115). And the two new one-race departments, involving six employees, resulted inevitably from the NLRB's definition of USW's bargaining unit.

Moreover, in the years immediately following unionization three of the one-race departments became integrated: the Welding Department in 1943: the Lumber Yard (now called Lumber Stores) in 1944; and the Die & Tool Department in 1946.[7] Thus, between 1942 and 1946, the number of one-race departments in USW's unit was *reduced* from seven to four. The number of *occupants* in these remaining one race departments totalled 20 whites and 21 blacks in a bargaining unit of over 1,300 employees.[8] 97% of the employees were in integrated departments.

(b) *"In the Years Thereafter"*

At all times, the number of employees in "one race" departments constituted a small fraction of the employees in the plant. In 1947, as just noted, 97% of the employees were in integrated departments. In 1965, more

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[7] The first seniority list in evidence is that of June 1, 1947 (PX 2 (1978 Trial)). That list shows several blacks in the Welding Department (identified by badge numbers in the 800's), the most senior of whom already had 4½ years seniority in the department. It shows 13 blacks in the Lumber Yard (identified by badge numbers in the 1600's), the most senior of whom already had more than 3 years' seniority. And it shows three whites (and nine blacks) in the Die & Tool Department (identified, respectively, by badge numbers in the 2000's and 1000's), the most senior white having eleven months' seniority in the department.

[8] The remaining one-race departments, and their populations, according to the 1947 seniority list, were as follows: Template (3 whites), Safety (Watchmen) (formerly called Plant Protection) (17 whites), Truck (14 blacks), and Safety (Janitors) (7 blacks). The total USW bargaining unit population is derived by counting all names on the seniority list excluding employees in IAM's Maintenance and Die & Tool Departments and those listed as "Salary" and "Military Service."

than 96% of the blacks and 93% of the whites were in integrated departments (see Br. at 6-7). And an examination of the particulars of the handful of instances in which such departments were created subsequent to 1941 shows that USW and the Company were not creating new departments to achieve "continued separation of the races" (App. 12a).

In the late 1940's, the Company unilaterally created a separate Inspection Department, drawing the inspectors from the various operating departments into a separate unit (App. 32a). The 1950 seniority lists shows nine employees in this unit, all white (PX 5 (1978 Trial)). The district court found this change "certainly rational—removing them [the inspectors] from responsibility to the very persons whose production they were called upon to inspect" (App. 32a). A separate Inspection Department existed at Pullman's Butler plant, where less than 1% of the employees were black (JA 206), at Pullman's Hammond plant, also with a small black workforce (JA 242), and at plants of other railroad equipment manufacturers (JA 330, 332).[8]

In 1954, coincident with the return to departmental seniority, the parties split out three small new departments from the Maintenance Department. Two of these were "one-race" departments: the Powerhouse (with five white employees) and the Boilerhouse (with three white

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[8] The district court noted further that, as USW had switched from departmental to occupational seniority in 1947 (see Br. at 10), the creation of the Inspection Department "deprived no one, white or black, of employment opportunities" (App. 32a, n. 8)—no one in an operating department could have exercised seniority on the inspector job even when that job was in his department. "With the return several years later to departmental seniority, it did, in retrospect, mean a loss of opportunities to both whites and blacks in the operating departments (*ibid.*).

employees).[10] Following the removal of these departments, the remaining population of the Maintenance Department was 49 whites and 14 blacks (PX 9 (1978 Trial)).[11] Thus, to the extent that this split-out deprived those remaining in the Maintenance Department of access to Powerhouse and Boilerhouse jobs, it did so for many more whites than blacks. And the record amply demonstrates the non-discriminatory rationale for separating the Powerhouse.[12] While the record is silent as to the reason for creation of the Boilerhouse Department, it does show that that department never had more than three employees, and ceased operating prior to the effective date of Title VII (App. 31a, n. 5; JA 336).

Also in 1954, coincident with the return to departmental seniority, the parties moved the 22 pipefitters and pipefitter helpers (all of whom were white) out of the integrated Steel Erection Department and into a new Air Brake Department (PX 8, 9). The rest of the Steel Erection Department remained intact (including 45 whites who were not pipefitters or pipefitter helpers). These whites, equally with the blacks in the Steel Erec-

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[10] JA 336. Cf. PX 8, 1978 Trial (seniority list of June, 1953) with PX 9, 1978 Trial (seniority list of Sept., 1954). The third new department split out from Maintenance—the Railroad Department—was integrated (PX 9).

[11] On this seniority list, badge numbers below 2000 were assigned to blacks, and badge numbers from 2000 up to whites.

[12] At the NLRB hearing in 1941, the plant manager had testified that it would be dangerous to allow even other electricians to move freely into the powerhouse job: "We like to know what experience a man has had, and what he has been doing, instead of just shooting up the works" (JA 142-143). When the powerhouse employees and the other electricians were certified by the NLRB in an (all-white) IBEW craft unit, Powerhouse was established as a separate department from Electrician (JA 336). Except for a brief period in 1946-47, no other employees had ever had seniority rights in common with Powerhouse employees (App. 41a). There is a separate Powerhouse Department at Pullman's Butler plant, where less than 1% of the employees are black (JA 206).

tion Department, were deprived of whatever departmental seniority rights they might otherwise have enjoyed with respect to pipefitter jobs had those jobs not been moved. Again the record affords an obvious nondiscriminatory explanation for the move.[13]

The foregoing constitute the only "one-race" departments in the USW bargaining unit. While the court of appeals recites that the creation of one-race departments continued for twenty-five years following unionization, App. 11a, in fact the only such events are those described above, the latest of which occurred seven years following unionization.

The court of appeals believed there were two more "one-race" departments created:

> [T]he seniority rosters indicate that between 1947 and 1952, the all-white watchmen and all-black janitors were both in the Safety Department. The 1953 seniority list carries both jobs under a Plant Protection Department. The 1954 seniority list shows the janitors in an all-black Janitors Department and the watchmen in an all-white Plant Protection Department. They remained separate departments until the time of trial. [App. 12a]

In the period prior to unionization, the Company had organized the plant so that watchmen were in a depart-

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[13] Pipefitters are craftsmen; precisely because that is so, the NLRB's original certification had placed them in the IAM unit ("employees in air-brake department," JA 166) while virtually all other Steel Erection employees were placed in the USW unit. USW brought the pipefitter jobs into its bargaining unit when it captured most of the IAM's unit in 1944 (see p. 7a, n. 3, *supra*), but that did not alter the reality that these jobs were substantially different from the others in Steel Erection.

ment of their own (then called the Plant Protection Department). Janitors were in a different department (then called Superintendence) (JA 103-104). When the NLRB defined the USW bargaining unit to include "watchmen" and "plant protection employees," JA 160, the Company (which until then had taken no position as to the definitions of appropriate units, JA 155), filed a motion making a single request: that the NLRB amend its decision by declaring that "[w]atchmen and plant protection employees shall be excluded from both the craft and industrial units" (JA 289). In that motion, the Company argued as follows:

> [I]t is inappropriate that watchmen and plant protection employees be included in any collective bargaining unit for the obvious reason that in the event of labor troubles of any kind or character such watchmen and plant protection employees should have no selfish or personal interest in the result of any such labor troubles, but should be in a position to discharge their full duties free of any influence or selfish or personal interest in the union or any such labor difficulties. [JA 290]

In 1941, it was permissible for the NLRB to include guards in a unit together with production and mainteance employees; this Court approved that practice in *Labor Board v. Jones & Laughlin Co.*, 331 U.S. 416, 422-427 (1947). Later that year, Congress, reacting to that decision, added § 9(b)(3) to the NLRA, 29 U.S.C. § 159(b)(3). That section provides:

> [T]he Board shall not . . . (3) decide that any unit is appropriate . . . if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises [and] no labor organization shall be certified as the rep-

resentative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

Congress thus reacted to the precise concerns which the Company in this case had addressed to the NLRB six years earlier. The NLRA amendment, however, came too late for Pullman; the guards were already in the USW unit.

The Company thereafter acted to protect its interest, as best it could, by insulating its guards from intermingled seniority with production and maintenance employees. Following the adoption of departmental seniority in the first USW contract, the Company maintained the guards as a separate department (JA 336). Contrary to the court of apepals' understanding, the Company never relented from that course. To be sure, the Company treated watchmen and janitors as both in the "safety department" between 1947 and 1954, but that nominal joinder (which was prompted by the fact that guards and janitors reported to the same supervisor (PX 2 (1978 Trial)) was of no seniority significance because occupational seniority prevailed under the USW contracts during that period (App. 40a). The 1947 seniority list (PX 2 (1978 Trial)) is the clearest proof that the Company regarded this joinder as different from the other departmental structures in the plant. With respect to every other department, the 1947 seniority list included all employees on a single roster, from the most senior on down to the most junior, without regard to job classifications. With respect to the "Safety Department" there were two separate rosters, one entitled "Safety Department (Watchmen)" and the other entitled "Safety Department (Janitors)." When the USW agreement was amended in 1954 to return to a departmental seniority system, the Company consistent with its long-term view

of its interest in preserving a complement of guards who were insulated from all other employees split the safety department into two departments, one containing the guards, the other the janitors.

At Pullman's Hammond plant, where a majority of the janitors are white, there is a separate janitor department just as at Bessemer (J.A. 242).[14]

An epilogue, furnished by the record, was noted by the district court in its decision (App. 37a, n. 18):

> It may be noted that the possibility of merging the Janitors and Plant Protection employees was raised in 1962 by a white member of the union's negotiating committee, but refused by a black member of that negotiating committee who was a member of the Janitors department.[15]

That reaction is not surprising. As the district court had learned at the first trial in this case:

> It is clear from the evidence that the blacks in the Janitor department prefer it to most—and a few of them prefer it to all—departments. The actual earnings of employees in the Janitors department indicate that, due to greater stability of employment, it may indeed have greater earnings potential than employment in a number of other departments with higher [job class] positions [App. 131a].

(3) "Conditions Of Racial Discrimination Which Affected The Negotiation and Renegotiation of the System"

The third fact which the court of appeals declared "significant in our decision" is "conditions of racial discrimination which affected the negotiation and renegotia-

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[14] This is equally true at some plants of other railway equipment manufacturers, see e.g. JA 335.

[15] See JA 238.

tion of the system" (App. 16a). It is not altogether clear what this means. Certainly there were "conditions of racial discrimination" prevalent at the plant during the period (1941-1954) that the seniority system took its shape. But nothing in the court of appeals' opinion explains the basis for its finding that those conditions "affected" the negotiation of the seniority system. Apparently, the third fact deemed "significant" by the court to its ultimate finding of discriminatory motive is simply that there was contemporaneous racial discrimination at the time that the seniority system was negotiated.

The district court had found that there was no warrant to infer from the Company's contemporaneous discrimination that the seniority system was improperly motivated, because that system was the product of USW's aims and policies, USW pursued "colorblind objectives," blacks had participated equally with whites in determining the form of the system, and the same system had eventuated in virtually all industrial plants including those where race could not have been a motivating factor.

The court below repeated, and no where challenged, the district court's findings that the system was the one sought by USW, that blacks had participated equally with whites in determining USW's position thereon, and that it was the "modal" system in American industry. However, the court of appeals' opinion contains additional statements concerning USW's attitude on race.

First, the court twice stated that the first USW contract excluded blacks from the better jobs:

> The first U.S.W. contract with Pullman-Standard, providing for departmental seniority, excluded blacks from the better jobs.
>
> * * * *
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> The record makes clear that blacks were restricted from the better jobs under the first U.S.W. contract. [App. 12a, 14a].

There was in fact nothing in USW's first contract[16] (nor in any subsequent one)[17] that allocated jobs on the basis of race. USW had sought to obtain in its first contract a provision that departmental seniority would control competition for promotions (see Br. at 14, n. 27); had the Company agreed to that provision, the 97% of the blacks who were then in integrated departments (Br. App. 9a, *supra*) would have had a contractual right to promote to traditionally white jobs on the basis of seniority. The Company resisted that demand until 1956 (App. 26a). The consequence was *not* that the USW contract excluded blacks from the better jobs, but rather that the USW contract had no application to the determination of who would get better jobs. The Company, by refusing USW's demands, retained the unilateral power to make all job assignments, including promotions. The Company was free to assign blacks to any and all jobs in the plant; nothing in the contract precluded its doing so. The *Company* chose instead to continue discriminating in making those assignments.[18]

Second, the court of appeals' opinion contains an implication that under the first USW contract "[b]lacks were relegated to the least remunerative departments." App. 12a. The USW contract did not mention race at all, and it did not determine to which departments employees would be assigned (that power was the Com-

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[16] PX 33 (1978 Trial).

[17] PX 34-45 (1978 Trial).

[18] Respondents, in their Brief in Opposition, conceded that USW's first contract did not allocate jobs on the basis of race (Br. Opp. 10-11, n. 13). Respondents suggested that that is not what the court of appeals meant by the statements we have quoted above; rather, respondents said, the court of appeals simply meant that USW's first contract, by establishing a system of departmental seniority, created a disincentive to transfer which perpetuated the effects of the Company's discrimination in job assignments (*ibid.*).

pany's, to exercise unilaterally), nor did it impose any "no-transfer" rule which would preclude employees, black *or* white, from moving between departments.[19] PX33 (1978 Trial). To be sure, as is true of every departmental seniority system, an employee transferring between departments would lose accumulated seniority and begin accruing competitive seniority anew in the new department.

Third, the court of appeals noted that "in 1941, some of the 'mixed' jobs even had different wage scales for whites and blacks" (App. 13a). The first USW contract, signed in April, 1942, did not specify wage rates. It provided for a uniform wage increase for all employees. And, most importantly, it provided for "local plant adjustment and settlement" . . . "[w]here alleged inequalities in wage rates prevail."[20] Throughout the first few years of unionization, the elimination of discriminatory wage rates was a major USW priority throughout the South. Myrdal, *An American Dilemma*, 1117 (1944). At the Bessemer plant, that subject was fought out not only at the bargaining table and on the picket line, but in repeated forays before the War Labor Board (JA 313-316, 216-220).

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[19] The court of appeals' opinion states that "the [seniority] system *and the attendant no-transfer rule* locked blacks into the least remunerative positions," App. 16a; emphasis added. As respondents conceded in their brief in opposition, p. 11, n. 13, there was no rule at this plant precluding transfers between departments. Respondents suggested therein that the court of appeals was using the term "no-transfer rule" to describe the "seniority forfeiture provision" of the departmental seniority system (*ibid.*).

[20] PX 33 (1978 Trial), pp. 2-3.

(4) "[T]he Extent To Which the System And the Attendant No-Transfer Rule Locked Blacks Into the Least Remunerative Positions Within the Company"

The fourth and final fact the court of appeals deemed "significant to our opinion" is "the extent to which the system and the attendant no-transfer rule locked blacks into the least remunerative positions within the Company," App. 16a.[21]

The court of appeals' finding overlooked an important feature of the seniority system, highlighted in the district court's opinion, i.e. that promotions were on the basis of departmental seniority. That provision had been the instrument, even prior to the effective date of Title VII, for enabling blacks to escape from the jobs to which the Company had assigned them and promote immediately to their "rightful place" within their departments. As the district court explained:

> [The seniority] system did not then provide—nor has there been any subsequent effort to erect—barriers to the reaching of one's "rightful place" as is typically provided by lines of progression. [App. 43a].

Because the historic Company assignment practice had not been "to segregate departments," but only to segregate jobs *within* departments (App. 55a), at all times 96% or more of the black employees were in integrated

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[21] So that there can be common ground in analyzing this finding of fact, we accept respondents' characterization in their brief in opposition that by "the attendant no-transfer rule" the court meant the "seniority forfeiture provision" of the departmental seniority sysem (Br. Opp. 11, n. 3). As the parties are agreed that there was no rule at this plant prohibiting transfers between departments (see Br. App. n. 19, *supra*), that is the only construction of the court of appeals' opinion which could make the words "attendant no-transfer rule" even arguably faithful to the record.

departments containing "white" jobs as well (see Br. App. *supra*, at 10a-11a). The seniority system entitled these black employees, whenever a vacancy arose within their departments, to exercise their departmental seniority to claim the job of their choice.

The seniority system, while providing immediate access to jobs *within* one's department, did create disincentives to transferring *between* departments. The court of appeals stated that "[b]lacks were relegated to the least remunerative departments" (App. 12a). The record shows that blacks were (and always had been) "relegated" to virtually all the departments in the plant (App. 128a; Br. App. *supra*, at 10a-11a). Of course, if one were to rank the departments in the order of their relative desirability, one could then determine whether a disproportionately large number of blacks, as compared to whites, were in "undesirable" departments. The court of appeals apparently believed that the district court had found that such a ranking would disclose a disparity in favor of whites; for, the court of appeals said:

> The district court acknowledged that a somewhat greater impact might be felt by blacks than by whites if one were to rank the . . . departments according to some perceived order of desirability . . . [App. 10a].

What the district court had actually said was the following:

> It may well be that a somewhat greater impact was felt by blacks than by whites, although—as indicated in the chart considered in Pullman-Standard I for a somewhat different purpose and subsequently analyzed in Pullman-Standard II—*this conclusion is by no means certain.* [App. 30a; emphasis added].

The chart in Pullman I to which the court referred (App. 128a), which ranked the departments by job class range, reflected no disparate impact upon blacks (App. 128a-130a). The court explained that it had used job class

range as the criterion for determining the relative desirability of departments because "it does provide a rough index of earnings potentials in the absence of other more reliable data, such as average earnings or average job class worked" (App. 127a, n. 27). On appeal from that ruling the court of appeals (in an earlier opinion, not the one now under review) held that the district court's finding that the chart provided a "rough index of earnings potentials" was "not clearly erroneous" (App. 82a-83a). Thus, as the court of appeals then recognized, the proof in the record at that time (which has not been supplemented on this point in the intervening years) was "insufficient to demonstrate loss" (App. 84a-85a).

The district court's statement quoted above thus was not a finding that blacks were more disadvantaged than whites by the departmental seniority system, but merely a proviso that if other criteria were used to determine the "relative desirability" of departments than that which the court itself had found most appropriate, it "may well be" that the result would reflect "a somewhat greater impact [upon] blacks than [upon] whites" (App. 30a). The district court found it unnecessary to pursue the line of inquiry further, concluding that no inference of discriminatory motivation would be appropriate regardless of its resolution:

> Where, . . . as here, a rule affects significant numbers of both white and black employees—and does so in an identical manner—it would be a misreading of Teamsters . . . to determine "neutrality" on the basis of its quantitative effects. [App. 20a].

The district court's point was that given the dispersion of whites and blacks among the departments, no matter what criteria of relative desirability were used to rank departments there would be substantial numbers of both whites and blacks in the departments ranked as "undesirable."